Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

TELECOR COMMUNICATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, contrary to the law in other circuits, a court may find that the state action doctrine is inapplicable as a defense to an antitrust claim where (i) the claim was based on contracts made by a defendant while it held a statutory monopoly, and (ii) the state regulatory agency with plenary authority over the transition to competition specifically refused, in its transition rulemaking, to abrogate those monopoly-era contracts.

2. Whether, contrary to the law in other circuits, a court may allow the recovery of treble damages based on a defendant's assumed continuation of antitrust violations into the future, where an injunction or the defendant's voluntary actions could prevent any such future violations and fully restore competitive conditions to the allegedly monopolized market.

3. Whether by limiting the definition of the "relevant market" as a matter of law to inputs at the upstream level of distribution, a court can relieve a plaintiff of the burden of proving harm to competition in the downstream market for consumers, where the only competition for sales occurred and plaintiffs' only claims for damages arose.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the following parties are respondents in this proceeding:

Advanced Communications, Inc.
Coinlink, L.L.C.
Jack Keeler, d/b/a Americall
Kenneth Meritt, d/b/a Oklahoma Heartland Payphone Services
Don Owens, d/b/a Owens Communications Co.
Payphone Plus, L.L.C.
Redlands Communications, Inc.
Sooner Telecommunications, Inc.

Petitioner is a wholly owned subsidiary of SBC Communications Inc., a publicly held corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Southwestern Bell Telephone Company ("SWBT") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 305 F.3d 1124 (10th Cir. 2002) and appears at 1a.[1] The order denying the petition for rehearing and rehearing en banc, over the dissenting votes of Judges Kelly and Hartz, appears at 84a, and is not reported. The district court's order granting respondents' motion for summary judgment on the issue of market definition appears at 50a. A related order precluding petitioner's expert testimony on market definition appears at 65a. The district court's order denying petitioner's motion for a new trial on damages appears at 70a. The district court's post-trial order on the issue of state action appears at 70a. None of the district court's orders is reported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on September 10, 2002. Petitioner's timely petition for rehearing and rehearing en banc was denied on November 12, 2002.

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1 References to the Appendix to this Petition are in the form "1a." References to the record before the court of appeals are in the form "SWBT-App. __."

CONSTITUTIONAL AND STATUTORY PROVISIONS[2]

15 U.S.C. §§ 2, 15(a), 26

47 U.S.C. §§ 276(b)(1), (3)

Okla. Const. art. IX, §§ 18-22, 24-25, 34

Okla. Stat. tit. 17, § 139.1

Okla. Stat. tit. 79, § 203

Okla. Stat. tit. 79, § 212

INTRODUCTION

This antitrust case arises in the context of Oklahoma's transition from an era in which pay telephone services were provided by regulated utilities operating under exclusive franchises to an era of open, albeit regulated, competition. As payphone competition began, petitioner Southwestern Bell Telephone Company ("SWBT"),[3] a former exclusive franchisee, had a large percentage of payphone locations under multi-year contracts. Until they expired, as many did annually, those contracts allegedly slowed the pace at which new payphone providers could obtain locations to place their phones. Plaintiffs-respondents are independent payphone service providers ("PSPs") who claimed that such contracts impeded their market entry. Over Judge Kelly's forceful dissent, the court of appeals panel sustained a $22 million antitrust treble damage award.

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2 The provisions listed below are set out in full in the Appendix to this Petition at 86-103a.

3 SWBT was one of the regional Bell telephone companies that were part of AT&T prior to its divestiture in 1982. *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). SWBT historically provided local telephone service in parts of Oklahoma, Arkansas, Kansas, Missouri and Texas.

In sustaining the verdict, the court of appeals held that: (i) the state action doctrine did not bar predicating antitrust liability on contracts made by SWBT while it was the exclusive franchisee, even though the state agency responsible for regulating the transition from monopoly to competition rejected the state attorney general's petition (supported by SWBT's competitors) to abrogate those pre-competition contracts; (ii) a jury could award damages for assumed future enforcement of SWBT's contracts, notwithstanding that any offending provisions were abatable by SWBT's voluntary actions or by injunction; and (iii) the relevant market should be defined exclusively at the upstream level of locations where payphones are placed, rather than at the consumer level which was the *only* source of plaintiffs' sales, revenues and claimed damages.

These rulings conflict with decisions in other circuits and raise questions of exceptional national significance. Although the verdict was rendered under state antitrust law, Okla. Stat. tit. 79, § 203 (102a), Oklahoma's antitrust statute provides that it "shall be interpreted in a manner consistent with federal antitrust law, 15 U.S.C. § 1 et seq., and the case law applicable thereto." Okla. Stat. tit. 79, § 212 (103a). Consequently, the court of appeals's opinion addresses only federal law. Because it establishes federal precedent that conflicts with the law in several other circuits on important and recurring issues, review by this Court is warranted.[4]

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4 This Court may review the Tenth Circuit's ruling to correct its erroneous construction of federal law. *See Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 152 (1984) (collecting cases where the Court "has reviewed the federal question on which the state-law determination appear[ed] to have been premised" and describing the practice of vacating lower court decisions "so that the [lower] court may reconsider the state-law question free of misapprehensions about the scope of federal

(continued....)

A. State Action. The state action doctrine ensures that statutes aimed at preventing private restraints, like the Sherman Act and the Oklahoma antitrust law, are not used to interfere with state regulatory decisions. The doctrine's deference to state regulatory policy reflects both the intended limits of the antitrust laws and the imperatives of federalism and state sovereignty. The decision below flouts these essential limitations on judicial power.

The Oklahoma Corporation Commission ("OCC") had plenary authority over SWBT's payphone contracts, and was responsible for regulating the transition from monopoly to competition. In exercising that authority, the OCC rejected proposals to speed competitive entry by abrogating SWBT's monopoly-era contracts. Notwithstanding the OCC's plenary authority over, and actual supervision of, those contracts – thereby fulfilling state action requirements – the courts below approved their use as "fair game" for a jury to find SWBT guilty of monopolization from the very first day competition began. This decision cripples the state action doctrine, is in conflict with other circuits, and invites collateral attacks on *actual* agency determinations, thereby encouraging states to slow, halt or encumber deregulatory initiatives.

B. Future Damages. Damages based on assumed future misconduct are impermissible. This is the law in at least three circuits. The Tenth Circuit, however, allowed future damages, even though by voluntary action or court order SWBT's contracts could be made terminable upon short notice and without penalty – and thus presumptively

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(continued) . . .

law"); *Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 816 (1986) ("Court retains power to review the decision of a federal issue in a state cause of action").

lawful. By blessing plaintiffs' choice of future damages over injunctive relief, the decision below allows damages based on speculative loss of customers for whose business, post-verdict, plaintiffs would otherwise have had to compete. It thereby fails to restore competition, while giving plaintiffs a windfall.

C. **Market Definition**. The overriding purpose of the antitrust laws is to protect consumer welfare. Competitors must establish injury to the competitive process itself, not just a decline in their own fortunes. *See, e.g., NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984) (Sherman Act is a "consumer welfare prescription"); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (antitrust laws for "'the protection of competition, not competitors'") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). The corollary principles are: (i) where the alleged source of competitive harm is single-firm monopolization, 15 U.S.C. § 2, proof of monopoly power in a properly defined relevant market is indispensable, *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 457 (1993); and (ii) absent proof of antitrust injury in the market where a competitor claims damages, the antitrust laws do not afford a damage remedy. *See Brunswick Corp.*, 429 U.S. at 489.

This Court has never held in a monopolization case that a competitor could recover antitrust damages for lost sales in a downstream end-user market absent proof of consumer injury. Under the decision below, however, a competitor for consumer sales can entirely avoid the burden of proving market definition, monopoly power and antitrust injury *with respect to end-users* simply by pleading that the relevant market is limited to inputs needed for those downstream sales. The decision is thus likely to foster significant confusion and circuit conflict – with potentially harmful results in numerous industries subject to intense

downstream inter-product competition, but dependent in part on upstream inputs.

STATEMENT OF THE CASE

A. The Payphone Business

Like many other aspects of telecommunications, competition in the payphone business began in the mid-1980s after the breakup of AT&T. At the option of individual states, payphones could be installed by persons who were not franchised local exchange carriers ("LECs"). Thousands of entrepreneurs, ranging from individuals and small businesses to major long-distance carriers and phone companies operating outside their LEC territories, entered the payphone business in the ensuing decade.

Operators of payphones make money principally from charges paid by consumers to use the phone service. Accordingly, the most desirable payphone locations are those accessible to heavy public traffic. To provide services to the public, payphone providers have to contract with property owners to obtain the right to place phones at their locations. Contracts typically run for multi-year terms and pay the location owner a percentage of revenues earned by the phone.

Over the past decade, the explosion of cellphone usage has devastated the payphone business. With cellphone prices declining and usage ubiquitous, consumer demand for payphones has collapsed. Banks of airport payphones stand idle as consumers talk on their cellphones, as do truck drivers, restaurant and bar patrons and teenagers on street corners.

B. The Regulatory Context

The State of Oklahoma historically granted exclusive franchises for all telephone services, including payphones. The exclusive franchises were regulated, in pervasive public

utility fashion, by the OCC, acting under authority granted directly by the Oklahoma Constitution. *See* Okla. Const. art. IX, §§ 18-22, 24-25, 34 (91a).

The OCC first considered opening payphones to competition in 1985. In deciding that continued exclusive franchises were in the public interest, the OCC applied classic regulatory principles, finding that competition would lead to cherry-picking by new entrants, leaving incumbents with "low or no profit locations" and thwarting Oklahoma's commitment to universal service. (119a). In 1990, the Oklahoma Legislature expressly authorized the provision of payphone service by persons other than franchised telephone companies, Okla. Stat. tit. 17, § 139.1, but "entrusted the implementation of that transition" to the OCC. *Telecor Communications, Inc. v. Southwestern Bell Telephone Co.*, 305 F.3d 1124, 1128 (10th Cir. 2002) (2a). The OCC limited such service to franchised utilities for another six years.

With the Telecommunications Act of 1996, 47 U.S.C. § 276 *et seq.*, Congress sought, *inter alia*, "to promote competition among payphone service providers," and effectively required all states to allow payphone competition. *See* 47 U.S.C. § 276(b)(1) (89a). Congress directed the FCC to regulate certain details of this national transition, while leaving other aspects to state regulation. Congress also provided that existing contracts with location owners for payphone sites were *not affected* by the legislation. *See* 47 U.S.C. § 276(b)(3) (90a).

At the state level, the OCC initiated a rulemaking docket to adopt rules for the transition in Oklahoma to a regime of regulated competition. (131a). There was a full-scale state administrative proceeding, including public hearings and written submissions from numerous participants, including the Oklahoma Attorney General, SWBT and potential new entrants. (151-55a).

At the conclusion of a four-month proceeding, the OCC issued comprehensive rules that authorized entry of new payphone providers while maintaining regulatory control. The OCC rulemaking included thorough evaluation of a proposal made by the Attorney General (called the "fresh look"), which would have given location owners a 90-day window to terminate existing payphone contracts without penalty and accept offers from new entrants. (154-55a). The OCC declined to adopt the proposal, but invited "the industry" to raise the issue again if there was "an interest or need to do so." (Id.). Thus, as contemplated by the OCC, SWBT entered the competitive era with its existing contracts in place and with competition focused on locations as each contract expired, as well as on new locations.

C. Plaintiffs' Claims

Although plaintiffs successfully competed in the payphone business - even after some entered on a virtual shoestring - they claimed that SWBT violated the Sherman Act, 15 U.S.C. § 1 *et seq.*, and state antitrust law by preventing them from gaining an even larger share. Their principal theory was a reprise of the contentions before the OCC that SWBT's monopoly-era contracts "locked up" location owners before competition began. According to plaintiffs, SWBT's carryover contracts made it an unlawful monopolist from day one of competition. *See* SWBT-App. 8386 (SWBT "begins with a 100% market share").

SWBT's contracts were virtually identical to the contracts used by plaintiffs. Nonetheless, under plaintiffs' theory, SWBT's large market share (derivative of prior state policy) barred it from using the same competitive tools. (SWBT-App. 8386). Plaintiffs also complained that SWBT impeded location owners from switching payphone providers by creating a bureaucratic "maze" for processing such requests, and that SWBT used "dirty tricks" in

removing its equipment to make it more costly for competitors to take over payphone locations.

D. District Court Proceedings

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1367. Plaintiffs moved for partial summary judgment on the issue of market definition. They asked the district court to define the relevant market as "the provision of public pay phones and related services to pay phone location owners." (51a). SWBT urged that the market was the provision of phone service to consumers who were "in transit" (*i.e.*, away from home or office), and thus included both payphones and cellphones. (51a). The court found that "[b]oth sides have presented an enormous amount of evidence, a review of which shows that they *hotly contest* the factual issues." (53a) (emphasis added).

Instead of denying summary judgment, however, the court went on to weigh the evidence using its "common sense," and rejected the opinions of SWBT's economic expert as "unreasonable" (60a). In granting plaintiffs' motion, it held that the "provision of public pay phones and related pay phone services" was the market. (61a). The district court also granted plaintiffs' *in limine* motion to exclude the opinions of defendant's experts "on cell phones and the effect of cell phones on the 'end users,'" holding that "[t]he relevant market has been defined to exclude cell phones." (66a).

The district court also denied SWBT's motion *in limine* under the state action doctrine to exclude evidence concerning contracts predating the commencement of competition in November 1996 – the monopoly-era contracts that had been the subject of the "fresh look" proceeding. (67-68a). It denied post-trial motions directed to this issue as well. (77a).

With respect to damages, the court denied SWBT's motion during trial to strike plaintiffs' claim for future damages arising from the assumed future enforcement of contracts already in existence. After the verdict, when SWBT argued that plaintiffs' claim for injunctive relief vitiated the future damages award, plaintiffs withdrew their demand for an injunction. The court then sustained the award of future damages. (70a).

E. The Tenth Circuit's Decision

A divided panel of the court of appeals affirmed on all issues, basing its decision entirely on federal law precedent. On market definition, the panel first unanimously rejected the district court's improper fact finding that cellphones and payphones were not sufficiently interchangeable to be part of the same market. (9-10a). Although the majority recognized that the jury could well have based its verdict on an assessment of the consumer market (5a), and that such assessment necessarily would be impaired by the improper exclusion of evidence of cellphone competition, it failed to reverse.

Instead, the majority affirmed on an alternative ground that "[l]ocation owners are the relevant customers" (18a), even though locations are merely distribution inputs used for sales to end-users. The majority's sole rationale for adopting this market definition was that the location-owner level was "where the Plaintiffs argued that Southwestern Bell has monopolized competition" (11a). Relying on cases brought by persons who were forced to sell at artificially low prices to monopsonies, the court of appeals fashioned an unprecedented rule that allows plaintiffs who suffer damages only from lost consumer sales to recover based solely on a competitor's alleged control over a distribution input, even where the consumer market is highly competitive.

The dissent saw the majority's "holding that end-users of phone services do not matter as in considerable tension with the Supreme Court's holdings" (38a), and as not required by the monopsony cases (41a). Rather, "the evidence plainly present[ed] a sufficient disagreement to require submission to a jury." (Id.).

The court of appeals rejected application of the state action doctrine because "no state policy expressly permitted [SWBT] to attempt to lock up customers contractually" (25a) and because the OCC did not actively supervise SWBT's contracting practices (25-26a). The dissent disagreed, finding that the "OCC determined how and when competition could begin [in Oklahoma]," and that the OCC rulemaking constituted active supervision. (44a).

Finally, the court affirmed the award of future damages. The majority reasoned that since SWBT had not offered to cease enforcing its contracts, "the district court was not obligated to assume that [SWBT] would voluntarily terminate its contracts with location owners." (34a). The dissent again disagreed, finding it inconsistent with antitrust principles to allow future damages for enjoinable conduct. (47-48a).

SWBT's petition for rehearing en banc was denied (with one judge recused) over the votes of Judges Kelly and Hartz.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS BY ALLOWING A FEDERAL JURY TO OVERRIDE STATE REGULATORY DECISIONS REGARDING COMPETITION POLICY

The state action doctrine embodies the fundamental policy that antitrust laws written to prohibit private restraints of trade should not be read to outlaw public restraints, particularly in light of fundamental principles of

federalism and state sovereignty. *See, e.g., Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 64 (1985); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Where a State has elected to subordinate competition to regulation, antitrust law must defer to that authority.

Although the basic contours of the state action doctrine are established, the lower courts have continued to struggle with its application. The transition from state-sanctioned monopoly to regulated competition has been particularly vexing. The decision below brings into sharp focus circuit conflicts in this context that require this Court's intervention.

A. Clearly Articulated State Policy

The court of appeals rejected SWBT's state action defense because, it said, "no state policy expressly permitted [SWBT] to attempt to lock up customers contractually long beyond the November 1996 introduction of competition in an effort to stymie that competition." (25a). On this basis, plaintiffs were allowed to make SWBT's location-owner contracts the centerpiece of their monopolization claim.[5] This holding – that the state action doctrine applied only if the State "expressly permitted" the challenged conduct – is flatly inconsistent with the doctrine's interpretation in at least three circuits[6] and in this Court. *See Town of Hallie v.*

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5 Plaintiffs' theory of liability focused on contracts pre-dating November 1996. In closing, they argued such contracts "locked up the market before competition opened up" (SWBT-App. 8397-98), and were a "wall that would prohibit people from coming into the market" (SWBT-App. 8374).

6 *See, e.g., Automated Salvage Transport, Inc. v. Wheelabrator Environ. Sys.*, 155 F.3d 59, 69 (2d Cir. 1998) ("the 'clear articulation' label . . . has always been construed as synonymous with the foreseeability test"); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1267 (3d Cir.

(continued....)

City of Eau Claire, 471 U.S. 34, 42 (1985) (authorization exists where "anticompetitive effects logically would result from . . . broad authority to regulate").

This case is the paradigm of a deregulatory transition, where new competitors blame the former statutory monopolist for business difficulties arising from the State's regulatory determinations. In such a context, it is almost inevitable that regulatory decisions will foreseeably create some obstacles for new entrants - obstacles that could be labeled "anticompetitive" in a later jury trial. Unless the State regulates to the contrary, the former exclusive franchisee necessarily will enter the competitive era with the various advantages arising from the legacy of state-sanctioned monopoly. For example, the former exclusive franchisee will likely enter the new competitive era with a 100% market share. It will benefit from time-honed business practices, contacts and know-how about the best routes, suppliers, locations, customers, and equipment. Similarly, it will have contracts in place with suppliers of inputs and with customers - contracts made while it enjoyed the advantages of its monopoly, presumably on terms that

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(continued) . . .

1994) ("to satisfy the clear articulation requirement, a defendant need only show that the 'legislature contemplated the kind of action complained of'") (quoting *Hallie*, 471 U.S. at 44); *Hass v. Oregon State Bar*, 883 F.2d 1453, 1457 (9th Cir. 1989) ("The legislature need not detail or compel the specific anti-competitive actions at issue, nor need it explicitly state that it expects the regulated party 'to engage in conduct that would have anticompetitive effects. Likewise, the legislature need not expressly *permit* the challenged conduct'") (quoting *Hallie*, 471 U.S. at 42) (internal citation omitted); *Hybud Equip. Corp. v. City of Akron*, 742 F.2d 949, 960-61 (6th Cir. 1984) (restraint need only be "reasonably related to an agency's express powers and reasonably designed to promote the state aims within a designated field of regulation").

reflect that monopoly position and, as here, were subject to regulatory oversight.

The State, which holds plenary authority over the statutory monopolist, is faced with making difficult policy and economic judgments. The State may place restrictions on the franchisee in the period leading up to competition or require that the franchisee share accumulated advantages with new entrants. The State may also decide to ease the burden of transition in recognition of the franchisee's continuing "public service" obligations, for example, to provide payphones at unremunerative locations, which new entrants can ignore. What is certain, however, is that the State necessarily makes a determination – whether through its legislature or a regulatory agency – about the terms on which the exclusive franchisee shall operate in the period prior to, and at the outset of, competition. That sovereign decision is made knowing that it will substantially impact the fortunes of new entrants.

That is what occurred here. As part of its rulemaking on the transition, the OCC considered proposed "safeguards . . . to protect the interest of competitive payphone service providers." (132a). The Oklahoma Attorney General argued that location owners should be given the option to cancel their contracts with incumbent LECs such as SWBT and sign up with a new entrant:

> Incumbent LECs in Oklahoma have literally had decades to identify the most lucrative payphone sites in their territories. They have also now had several months "head start" to renegotiate contracts with these site owners in an effort to "lock" them in and make it more difficult for new competitors to negotiate agreements for these sites. . . . Existing contracts between incumbent LECs and payphone site owners are a significant, perhaps insurmountable entry barrier to competitive

> payphone providers. Allowing all site owners the option of renegotiating these contracts . . . will eliminate this barrier.

Brief of the Oklahoma Attorney General on the Commission's Authority to Allow for the Renegotiation of Existing Contracts at 5, 10 (SWBT-App. 3733, 3738). Potential new entrants complained that SWBT's contracts "hinder[ed] competition" (45a) (dissent), and endorsed the Attorney General's position. SWBT (and others, including some new competitors) opposed it.

Thus, the very arguments presented by the plaintiffs as the foundation for antitrust liability in this case were rejected by the OCC after careful consideration:

> The final issue, which received much attention and oral and written comment, was the Attorney General's proposal to create a rule which would provide a 90-day window of opportunity for payphone site-owners to take "a second look" at their preexisting contracts with the incumbent LECs, and decide whether or not to remain bound by said agreements or to terminate them without penalty, and renegotiate with a new competitor for more favorable terms. . . . After reasonable deliberation and consideration of the issue, the Commission voted not to entertain such a rule at this time, but rather suggested its willingness to entertain further discussion and investigation into the matter, should the industry indicate an interest or need to do so.

(154-55a).

The dissent below was thus correct that "not until the OCC determined how and when competition could begin did Oklahoma change its policy" of subordinating competition to regulation. (44a). Unquestionably, the OCC's plenary authority under the Oklahoma Constitution

and the 1990 legislation to determine "how and when" to alter SWBT's monopoly, included authority over its contracts.[7] It is difficult to imagine a clearer example of the foreseeable competitive consequences of state policy than the OCC's decision to leave the monopoly-era contracts of a regulated utility in place and to retain jurisdiction to consider the future impact of SWBT's contracts.

Given this context, a circuit conflict arises because the proper inquiry is not whether the state "expressly permitted" SWBT to make contracts to "stymie . . . competition" (25a), but rather, as the Second Circuit holds, "'whether the legislature could foresee the anticompetitive effects that would follow from the express authority the state had delegated.'" *Automated Salvage Transport, Inc. v. Wheelabrator Environ. Sys.*, 155 F.3d 59, 69 (2d Cir. 1998) (quoting *Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc.*, 790 F.2d 1032, 1042 (2d Cir. 1986)). Similarly, the Tenth Circuit's requirement of "express permission" flatly conflicts with the Third Circuit standard: "State approval of [the statutory monopolist's] activity is not required for immunity to attach"; the question is whether the challenged conduct "is reasonably foreseeable." *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1267-68 (3d Cir. 1994).

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7 The Oklahoma Constitution (not mere legislative delegation) grants the OCC "the power ... of supervising, regulating and controlling all ... [telephone] companies ... in all matters relating to the performance of their public duties ... and of correcting abuses ... by such companies...." Okla. Const. art. IX, § 18 (91-93a). If any interested person (including SWBT's competitors) believed the OCC had not followed the mandate of the 1990 legislation, they had a constitutional right, under Okla. Const. art. IX, § 20 (94-96a), to appeal to the State Supreme Court. (46a) (dissent).

That it was State policy to bring "competition to the payphone market," as the panel majority noted (25a), does not change the fact that the legislature delegated both the timing and manner of the transition to the OCC. The Tenth Circuit's failure to recognize the significance of the OCC's plenary transition authority conflicts with the careful analysis undertaken by other circuits when faced with similar legislatively-mandated transitions. For example, in *Hass v. Oregon State Bar*, 883 F.2d 1453, 1458 (9th Cir. 1989), the Ninth Circuit held that the "clear articulation" requirement was met where the state left to the agency the task of selecting the course of action best suited to accomplishing legislative policy. Similarly, the Sixth Circuit observed:

> An agency vested with broad discretionary powers will rarely find that only one course of action is available to accomplish its mission.... Our task, therefore, is to determine whether the restraints in question are a reasonable and foreseeable exercise of delegated power within the scope of an agency's authority.

Hybud Equip. Corp. v. City of Akron, 742 F.2d 949, 960 (6th Cir. 1984). The court below, however, adopted a rule that dispenses with the foreseeability inquiry altogether, since it was clearly foreseeable that the OCC, in its delegated implementation of payphone deregulation, might choose from a wide array of options affecting the transition, including to allow existing contracts to stand.

B. Active Supervision by the State

The Tenth Circuit's interpretation of the second prong of the state action test – active supervision – also conflicts with other circuits as it intrudes into Oklahoma's exercise of sovereign powers. After what the OCC described as "much attention and oral and written comment" on the effect of

SWBT's contracts on competition, the OCC determined not to alter them – but stated that it would be willing to do so in the future. (154-55a). This is *actual* supervision, involving a full-scale hearing addressed to the very issue later raised in federal court. *Actual* supervision is, by definition, *active* supervision. As the dissent recognized, the OCC's "ultimate control over SWBT's alleged anti-competitive conduct" (44a) meets this standard.

By holding that "ultimate control" did not exist because the "state likely was not even aware of the full extent of Southwestern Bell's lock up conduct" (25a), the court of appeals compounded its affront to state sovereignty by challenging the competence of the OCC's decisional process. The state action doctrine does not authorize a federal court to second-guess a state agency's fact-finding; the doctrine's very premise is deference to the State.[8] It is precisely to avoid a federal court's substitution of its subjective judgment for the decision of the responsible state agency that this Court adopted an objective standard for "active supervision." *See Patrick v. Burget*, 486 U.S. 94, 101 (1988).

The Tenth Circuit's "speculation," as the dissent put it (46a), about what the OCC "likely" knew revolves entirely around SWBT's answer to a single OCC interrogatory in which SWBT *truthfully* (as expressly found by the district court) disclaimed that it was seeking to enter into contracts with *all* of its location owners.[9] Moreover, the totality of OCC submissions specifically apprised the Commission of

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8 The availability of an appeal to the Oklahoma Supreme Court of an OCC rule based on inadequate fact-finding underscores the need for federal court deference. (46a) (dissent).

9 The district court found that SWBT's interrogatory answer "may not have been complete" but that it was not a "misrepresentation" and was "truthful." (SWBT-App. 4686-88).

this contracting activity, the contracts themselves and their likely effect on competitive entry.[10] Even if the state agency's fact-finding were incomplete – or wrong – a federal court is not empowered to substitute its own view of the "proper" regulatory approach.

The conclusion that there was no "active supervision" here because of the state's incomplete knowledge conflicts with the holding of the Eleventh Circuit that such awareness is unnecessary. Thus, *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560, 1569-70 (11th Cir. 1996), held that conduct by Florida Power & Light ("FPL") was actively supervised by the state Public Service Commission ("PSC"), even though the PSC "was not given the opportunity to exercise its power to review FPL's conduct" because no one complained about it. It was enough that "the doors to the PSC were open to all with standing to complain. Being met with a complaint, the PSC had the full power to actively supervise." *Id.* at 1570. A clear conflict exists, since the Tenth Circuit denied immunity based on the possibility the OCC did not consider certain facts, even though the OCC indisputably "had the full power to actively supervise" – and unlike the Florida PSC, actually made a decision after a hearing.

In sum, the Tenth Circuit has radically rewritten the rules governing intrusion by federal courts into issues affecting competition that the States have expressly entrusted to regulatory agencies. The upshot assuredly is "nothing more than a collateral attack on the OCC's right to supervise, regulate and control matters relating to the

---

10 Those presentations painted SWBT's long-term contracts as "coercive," as the product of a "Blitz," and as slowing the advances of potential competitors. The court of appeals was thus demonstrably wrong in asserting that these facts were not "known" to the OCC. (25a).

performance of [public utility] duties and of correcting abuses." (47a) (dissent).

The context of the decision below gives it broad significance. The transition from a statutory monopoly to regulated competition, supervised by state regulatory authorities, is a recurring phenomenon. The grave economic consequences of subjecting a once-exclusive franchisee to antitrust liability for actions taken before competition was authorized may well delay or derail further deregulatory efforts. No less important is the threat that the decision below poses to state sovereignty in regulating the transition to competition.

II. THE DECISION ALLOWING DAMAGES FOR AVOIDABLE FUTURE MISCONDUCT CONFLICTS WITH DECISIONS OF AT LEAST THREE CIRCUITS

The damage award transgresses the most basic principles governing antitrust remedies. It establishes a new rule allowing juries to reward individual competitors with a treble-damages windfall based on a defendant's presumed future misconduct, while failing to protect the competitive process and consumer welfare, even when that could have been readily accomplished by injunctive relief. It conflicts with the law of antitrust remedies in other circuits and with this Court's focus on antitrust as a means of protecting competition and enhancing consumer welfare.

Moreover, the decision below ignores the clear terms of the antitrust statutes themselves. The statutory language – which is the sole source of courts' remedial authority in antitrust cases – allows damage awards only to persons "injured in [their] business or property by reason of" an antitrust violation. 15 U.S.C. § 15(a). In contrast, private plaintiffs may obtain injunctive relief "against threatened loss or damage." 15 U.S.C. § 26. Yet the court of appeals

awarded treble damages for injuries that were no more than "threatened."

The math in this case is straightforward. A maximum of $2.74 million awarded to plaintiffs can be justified as past lost profits. (32a). The remainder of the jury award - $4.75 million, trebled to $14.25 million, plus interest - necessarily represents future lost profits based upon future enforcement of pre-existing contracts. (Id.). An injunction against enforcing the contracts, of course, would have prevented future harm to plaintiffs and would have benefited all payphone competitors. Yet the court of appeals allowed plaintiffs to recover over $14 million without ever competing for the business in a marketplace unfettered by SWBT's allegedly anticompetitive contracts with location owners.

This decision conflicts with decades of antitrust law and remedies jurisprudence. *First*, the court of appeals's ruling conflicts with the decision of the Seventh Circuit holding that antitrust remedies cannot be awarded on the basis of a presumption that the defendant will continue to engage in conduct adjudged to violate the antitrust laws. *See Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 745 F.2d 441, 449-50 (7th Cir. 1984). As the dissent recognized, that "assumption is wrong as a matter of law." (47a).

Second, the decision conflicts with decisions in at least two other circuits holding that avoidable damages, arising from unlawful actions yet to occur, cannot support a damage award. *See Flintkote Co. v. Lysfjord*, 246 F.2d 368, 395-97 (9th Cir. 1957) (plaintiff cannot "recover for anticipated invasions"); *Connecticut Import. Co. v. Frankfort Distilleries, Inc.*, 101 F.2d 79, 81 (2d Cir. 1939) (damages are precluded where illegal acts may not be continued). Indeed, a plaintiff cannot "recover for anticipated invasions, even though they are of the same general character of those he

has already sustained." *Momand v. Universal Film Exchange, Inc.*, 43 F. Supp. 996, 1006 (D. Mass. 1942).

Third, if there is evidence that unlawful conduct will recur, plaintiffs' sole recourse is to injunctive relief. An injunction against anticompetitive conduct affords the benefits of competition not only to the individual plaintiff, but to the public at large and to all competitors in a monopolized market. On the other hand, an award of future profits, trebled, provides plaintiffs with a huge windfall, but does nothing directly to restore competition for the benefit of the public interest.

That is what happened here. Plaintiffs *withdrew* their claim for injunctive relief *after* SWBT filed its motion attacking the jury award as including lost future profits. (SWBT-App. 3553-54). Given a choice, plaintiffs unsurprisingly opted to pocket treble damages now, rather than to enjoin SWBT from enforcing the offending portions of its contracts. An injunction, of course, would have required plaintiffs to try to earn their supposedly lost future profits by competing with SWBT, as well as all other independent payphone providers. Plaintiffs should never have been offered that choice because the jury was not entitled to award future damages.

The court of appeals's concern for "thousands of contracting third-party location owners" who might not "want to terminate their contracts" with SWBT is baseless. (33a). No injunction would have *required* termination. Location owners could simply have been granted the option to do so, if they had a better offer. This would have cured any possible continuing violation, because a contract that is terminable at will cannot, as a matter of law, "lock up the market." *See Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162-64 (9th Cir. 1997); *Paddock Publ., Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 47 (7th Cir. 1997); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 238-39 (1st Cir. 1983).

Similarly, if location owners were bound to SWBT's contracts by virtue of penalties for early termination (3a), these easily could have been enjoined or not enforced.

The extraordinary significance of the court of appeals's error is illustrated by its comment that SWBT did not "indicate that it requested or consented to [a damages-avoiding] injunction either before or after the jury decided the damages issue," and did not provide "*any* assurance" that it would not engage in future misconduct (33-34a) (emphasis in original). The notion that a defendant contesting liability would agree to an injunction prior to the verdict is self-evidently absurd. After the verdict, the idea of a *defendant* requesting an injunction against itself *where the plaintiff does not seek one* transgresses Article III's "case or controversy" requirement. Nor does there exist any mechanism of law that affords relief from a jury's damages award based on defendant's "assurances." The only proper remedy was to limit the damage award to actual injuries from past conduct.

The inability of the court of appeals to identify "relevant authority" or "justification" to support the proposition that "a contract-avoiding injunction forecloses the availability of damages" (34a) demonstrates its misguided approach. The point is that future damages which are avoidable if the defendant ceases further misconduct, or if such acts are enjoined, are not recoverable at all.

III. BY UPHOLDING LIABILITY AND DAMAGES FOR COMPETITOR CONDUCT THAT DID NOT INJURE COMPETITION IN THE CONSUMER MARKET, THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS THAT REQUIRE PROOF OF ANTITRUST INJURY IN THE MARKET WHERE THE PLAINTIFF COMPETES FOR SALES AND CLAIMS DAMAGES

Plaintiffs' only sales were to consumer end-users of payphones, and plaintiffs' only damages were based on alleged losses of such sales. In that consumer market, payphones face powerful competition from cellphones. Accordingly, it was possible for a jury to find that even total control by SWBT of payphone locations would not (because of competition from cellphones) give it monopoly power over consumers. Nonetheless, the court of appeals concluded that "regardless of the interchangeability of pay phones and cell phones at the end-user level," only locations count for market definition purposes (11a). The result was to relieve plaintiffs of the obligation to prove harm to competition in the only market where they suffered damages, even though proof of such harm is an essential element of an antitrust damage claim. *See Brunswick Corp.*, 429 U.S. at 489.

This holding conflicts with decisions in other circuits which establish the elements of liability where competitors complain – as here – that they are "foreclosed" from access to upstream distribution inputs by the contracting practices of defendants. In those cases, foreclosure of access is an antitrust violation because it causes consumer injury, not because it harms access to distribution for its own sake. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 59-64, 69-71 (D.C. Cir. 2000) (defendant's contracts with personal computer manufacturers and internet access providers were exclusionary because they foreclosed competitors' ability to

sell their operating systems downstream to "computer users," where defendant had a monopoly); *Omega*, 127 F.3d at 1163 ("Where the exclusive dealing restraint operates at the distributor level, rather than at the consumer level, we require a higher standard of proof of 'substantial foreclosure,' because it is less clear that a restraint involving a distributor will have a corresponding impact on the level of competition in the consumer market") (quoting *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1235 (8th Cir. 1987)); *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) ("The exclusion of competitors [in exclusive dealing cases] is cause for antitrust concern only if it impairs the health of the competitive process itself"; the "effect of the exclusion [must] be to raise prices above (and therefore reduce output below) the competitive level.").

In the case of monopolization suits brought by competitors, particularly in suits based - as here - on allegedly exclusive contracts, the potential danger is that a monopolist, by raising barriers to entry, will gain the ability to charge supracompetitive prices or restrict output in the ultimate consumer market from which it derives revenue. *See, e.g., AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 230 (2d Cir. 1999) (monopoly leveraging claim requires a threat of "higher prices or reduced output" in the "second, non-monopolized market"). Thus, the relevant market must be defined as the "area of effective competition" between the defendant and plaintiff, in which they compete for "consumer potential." *Intergraph Corp. v. Intel Corp.* 195 F.3d 1346, 1353 (Fed. Cir. 1999). Here, of course, competition for "consumer potential" occurred only

in the end-user market, where plaintiffs' damages allegedly arose.[11]

This Court has never held that in a monopolization case where the parties compete for sales to consumers, a plaintiff can avoid showing competitive injury to consumers arising from the alleged exclusionary conduct simply by defining the market to consist exclusively of the distribution outlets (*e.g.*, payphone locations) necessary to provide the downstream competition. Rather, the antitrust laws are first and foremost intended to protect consumer welfare. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("consumer welfare prescription"). In a Section 2 context, this means the defendant must have the power to raise prices above, or reduce output below, competitive levels. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464, 481 (1992). Whether such power to harm consumers exists is a threshold factual issue in any monopolization case. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 457-59 (1993). Indeed, where vigorous inter-product competition exists, even if a single supplier controls 100% of the inputs necessary to sell one such product, competition from an interchangeable product can protect consumers from the exercise of market power. *See Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 266 (7th Cir. 1984) (control of patent does not matter "if no consumer interest can be discerned ... in a suit brought by a competitor"); *E.I.*

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11 The court of appeals chided petitioner for relying on *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956), for the proposition that market definition must be evaluated from the end-user's perspective. (11-12a). According to the court, the "reference to consumers [in duPont] makes perfect sense . . . given that the market at issue [sale of cellophane wrap] indisputably was a consumer market." (12a). This is no distinction at all, however, since the only sales at issue here were also made by the parties to consumers.

Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 305-306 (10th Cir. 1975) (control over unique product endorsement is significant only if there is market power in consumer market). In such circumstances, there can be no monopolization, no restraint of trade and no antitrust damages in the end-user market. The decision of the Tenth Circuit effectively jettisons all of this authority, and transforms the antitrust laws into a competitor-protection tort. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (antitrust laws do not "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce").[12]

Nothing in the monopsony cases cited by the Tenth Circuit justifies this result. Those cases find liability for conspiracies among horizontal competitors to fix the price at which a commodity is bought, or to boycott a supplier. *See Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) (horizontal price fixing conspiracy among buyers); *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001) (horizontal conspiracy); *Brown v. ProFootball, Inc.*, 50 F.3d 1041, 1061 (D.C. Cir. 1995) (Wald, J. dissenting), *aff'd*, 518 U.S. 231 (1996) (same); *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745 (10th Cir. 1999) (horizontal boycott); *Reazin v. Blue Cross*, 899 F.2d 951 (10th Cir. 1990) (horizontal boycott). These cases thus stand only for the unremarkable

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12 Not only does the decision below conflict with rulings in this Court and other circuits, it conflicts with the views of the expert agency responsible for telecommunications nationwide. As the FCC has repeatedly found, cellphones "are an adequate substitute for payphones for many end users," and "the proliferation of such telephones acts as another constraint on the ability to sustain supracompetitive prices for payphone services." *See In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 F.C.C.R. 20541 n.773 (Sept. 20, 1996).

proposition that a seller victimized by a buyer's cartel in a particular market has the same remedies as a buyer victimized by a seller's cartel. In this case, of course, plaintiffs sell nothing in the input/location market.

The court of appeals brushed aside *Addamax Corp. v. Open Software Foundation Inc.*, 888 F. Supp. 274, 280 (D. Mass. 1995), and *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1202 (W.D.N.Y. 1995) as "inadequate to overcome" the pure monopsony, seller-plaintiff cases. (18a). The court failed to recognize, however, that these were not pure monopsony cases. Rather, they involved claims, like plaintiffs' here, that monopsony power was used to handicap plaintiffs seeking to compete for sales in consumer markets. Like the exclusive contract cases, these district courts correctly held (in conflict with the Tenth Circuit) that proof of consumer harm was required in such circumstances.[13]

Finally, the court of appeals's "holding that end-users of phone services do not matter" (38a) (dissent), ignores fundamental limits on the use of summary judgment. As the court of appeals recognized, the jury here was permitted to impose liability and award damages by focusing

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13 The court of appeals lost sight of the fundamental distinction between a plaintiff who is the direct victim of monopsonistic conduct – such as a location owner might be – and the plaintiffs in this case, who suffered no losses in that market. The court thus tore down a strawman when it wrote at length that "suppliers" such as location owners "are protected by antitrust laws even when the anti-competitive activity does not harm end-users." (13a). Rather, the crucial point is that plaintiffs here are not "suppliers." They are SWBT's competitors in the downstream consumer market, where cellphones prevent SWBT from exercising any monopoly power.

exclusively on the consumer market. (5a).[14] No such verdict could properly be sustained, however, given the court's unanimous holding that a jury question was presented as to whether consumers view cellphones and payphones as being reasonably interchangeable. (38a) (dissent) ("there was a factual dispute . . . as to whether Plaintiffs' theory [of the relevant market] was correct"). In straining to excuse this reversible error, the majority applied a disputable legal presumption concerning market definition, thereby improperly resolving an acknowledged factual dispute as a matter of law. *See Kodak*, 504 U.S. at 456, 466-67.

The court of appeals's market definition ruling cannot be reconciled with the decisions of this Court or other circuits. It potentially affects every industry where competitors in end-user markets can claim they are handicapped in obtaining production or distribution inputs necessary to make sales in end-user markets. The ruling thus invites plaintiffs and other courts to abandon the required proof of antitrust injury necessary to recover damages for lost consumer sales.

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14 The district court's summary judgment and *in limine* rulings, as well as its jury instruction, defined the market as the "provision of public payphone service . . .," but did not limit the evidence, counsel's arguments or the jury's deliberations to the location owner point of distribution. Thus, the district court's rulings left the jury free to find consumer injury, where (because of cellphones) there was none, and the plaintiffs were free to contend that SWBT price-gouged its end-user customers without rebuttal based on cellphone competition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

February 5, 2003

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Supreme Court, U.S.
FILED

(2)

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OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

TELECOR COMMUNICATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 01-6067 and 01-6138

TELECOR COMMUNICATIONS, INC., an Oklahoma corporation; ADVANCED COMMUNICATIONS, INC., an Oklahoma corporation; COINLINK LLC, an Oklahoma limited liability company; JACK KEELER, d/b/a Americall; KENNETH MERITT, d/b/a Oklahoma Heartland Payphone Services; DON OWENS, d/b/a Owens Communications Company; PAYPHONE PLUS LLC, an Oklahoma limited liability company; REDLANDS COMMUNICATIONS, INC., an Oklahoma corporation; and SOONER TELECOMMUNICATIONS, INC., an Oklahoma corporation;

Plaintiffs - Appellees,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, a Missouri corporation,

Defendant - Appellant.

Appeal from the United States District Court
for the Western District of Oklahoma.
(D.C. No. 98-CV-1249-C)

FILED
United States Court of Appeals
Tenth Circuit
SEP 10 2002
PATRICK FISHER
Clerk

Before **EBEL** and **KELLY**, Circuit Judges, and **WINDER**,* Senior District Judge.

EBEL, Circuit Judge.

Southwestern Bell Telephone Company appeals from a jury verdict finding it guilty of monopolistic behavior in violation of Oklahoma state law and assessing damages of over $7 million, trebled to over $20 million. At issue is Southwestern Bell's domination of the Oklahoma pay phone market, a market it legally monopolized, under the oversight of the Oklahoma Corporation Commission (OCC), until November 1996. The plaintiffs are nine independent pay phone service providers whose efforts to compete with Southwestern Bell succeeded only in whittling down the latter's market share to roughly 80 percent after two years of competition. On appeal, Southwestern Bell challenges several aspects of the district court's rulings, most notably its definition of the relevant market. While we do not embrace the district court's analysis in its entirety, we nevertheless believe that the challenged rulings were proper, and we therefore **AFFIRM**.

BACKGROUND

In the decades up until November 1996, Southwestern Bell enjoyed a legal monopoly over the provision of pay phone services in the state of Oklahoma. As early as 1990, the Oklahoma legislature had decided to move from monopoly to competition in this market, but it entrusted the implementation of that transition to the OCC, which failed to end Southwestern Bell's monopoly until passage of the 1996 Telecommunications Act, 47 U.S.C. § 276(b), forced its hand. After a four-month

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* The Honorable David K. Winder, Senior District Judge, United States District Court for the District of Utah, sitting by designation.

rulemaking proceeding, the OCC authorized new pay phone providers in November 1996, subject to certain regulatory requirements.

Pay phone service providers ("PSPs") such as Southwestern Bell and the Plaintiffs typically do not own the land on which the pay phones are located. Rather, they make a deal with the party that owns the land ("location owner"): the PSP gets permission to place the pay phone on the location, and in exchange the location owner gets a commission, typically a percentage of the phone's receipts.

The Plaintiffs' evidence at trial showed that, prior to the Oklahoma legislature's 1990 decision to end its pay phone monopoly, Southwestern Bell had projected that it would lose 77 percent of its pay phone revenues in the first year of open competition. (The facts discussed here were disputed at trial and are presented in the light most favorable to the Plaintiffs.) In response, in 1991 Southwestern Bell undertook an intentional campaign to make entry into the Oklahoma pay phone market more difficult by attempting to secure every possible pay phone location through long-term contracts between Southwestern Bell and the location owners. This "lock up" campaign continued through 1996 and accelerated dramatically with what Southwestern Bell termed "the Blitz" in 1995-96 on the eve of the coming of competition.

The contracts contained several provisions designed to freeze out Southwestern Bell's competitors, including automatic renewal terms and stiff penalties for early termination.[1] In addition to the lock up, Southwestern Bell employed several other measures to freeze out competition,

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[1] According to one witness, early termination fees could be as high as $7,200 on a location that might be paying the location owner only about $200 a year in commissions.

including erecting a bureaucratic maze to discourage location owners who tried to terminate their contract, failing to remove its pay phones when requested to do so, and damaging the pay phone location when removing a phone.[2]

Southwestern Bell's anti-competitive actions were highly successful. Although its competitors offered better commissions to location owners and better phones at cheaper rates to customers, at the end of the second year of competition Southwestern Bell retained more than 87 percent of the market, with no single competitor above 2.4 percent.

The Plaintiffs filed suit against Southwestern Bell claiming violations of federal and state antitrust law. The district court issued four different written decisions, two pre-trial and two post-verdict. The first order, filed March 1, 2000, dealt with the relevant product market pursuant to cross-motions for summary judgment. The Plaintiffs argued that the relevant market was the provision of pay phone facilities and services to location owners. Southwestern Bell argued that the product market should be evaluated from the viewpoint of the end-user of the phone services and should therefore include both pay phones and cell phones, which Southwestern Bell argued were reasonably interchangeable at the end-user level. The district

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[2] By way of further example, many of Southwestern Bell's contracts called for a 50% reduction in the commissions payable by Southwestern Bell to the location owner if the location owner allowed competitive pay phones on its location alongside Southwestern Bell's pay phones. This was tantamount to precluding competitive pay phones because, in the unlikely event that the additional phones would increase total revenues for that location (there was evidence that Southwestern Bell would usually already have placed the optimal number of phones at a given location), the location owner would receive a much smaller percentage of those revenues. The damage Southwestern Bell did to the property when withdrawing its phones also made the property less attractive to providers of competitive pay phones.

court did not address whether the market should be evaluated at the level of the location owners or at the level of the end-users, but it did rule that pay phones and cell phones were not reasonably interchangeable, and thus, that the market should be limited to pay phones. Ultimately, the jury instructions submitted by the district court defined the relevant market simply as "the provision of pay phone and pay phone related services" without differentiating whether it should be evaluated at the level of the location owners or at the level of the end-users. Southwestern Bell does not claim to have objected to this instruction, so it is clear that the parties allowed the jury to determine which set of customers should be used in evaluating monopoly power.

The second order, filed March 23, 2000, addressed various motions in limine, none at issue on appeal. The third order, filed January 31, 2001 (after the jury found Southwestern Bell liable for state antitrust violations but not liable for federal antitrust violations), rejected Southwestern Bell's motion for a new trial on the issue of damages. The central contention addressed in that order was whether the damages awarded were based improperly on anticipated future illegal conduct. The fourth order, also filed January 31, 2001, rejected Southwestern Bell's motion for judgment as a matter of law or new trial. That motion argued, inter alia, that the jury improperly was allowed to consider Southwestern Bell's lobbying efforts before the OCC and its pre-November 1996 conduct, that the verdict failed to account for the temporary contractual nature of Southwestern Bell's market power, and that the verdict violated the state action doctrine. Southwestern Bell appeals the district court's resolution of all of these issues.

DISCUSSION

The district court had jurisdiction over the federal antitrust claims pursuant to 28 U.S.C. § 1337 and over the state antitrust claims pursuant to 28 U.S.C. § 1367. We have jurisdiction under 28 U.S.C. § 1291.

A. Relevant Product Market

The first step in analyzing a monopoly claim is to define the relevant market in which the defendant was operating. *SeeFull Draw Prods. v Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir. 1999); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 966 (10th Cir. 1994). The relevant market inquiry has two components: geographic market and product market. *Full Draw Prods.*, 182 F.3d at 756. Only the latter is at issue in this appeal. Southwestern Bell contends that the relevant product market should include cell phones as well as pay phones, while the Plaintiffs argue that the market is limited to pay phones. The parties' underlying interests in this regard are conflicting: Southwestern Bell wishes to define the market as broadly as possible (which would make it more difficult for a jury to find that it exercised monopoly power), and the Plaintiffs wish to define the market as narrowly as possible (which would make it easier to find monopoly power). The parties filed cross-motions for summary judgment on market definition, and the court granted the Plaintiffs' motion, ruling that cell phones were not part of the relevant market.

We have previously explained the relevant product market analysis as follows:

> The market power query begins with the determination of the relevant market, that is, a market relevant to the legal issue before the court. The market which one must study to determine when a producer has monopoly power will vary with the part of

commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced--price, use and qualities considered. We also look to the geographic reach of the group of sales or sellers to determine the relevant market. Further, because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the relevant market rests on a determination of available substitutes.

> To define a market in product and geographic terms is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price and volume.

Although these concepts provide a shorthand for rule of reason analysis, we would be amiss to imply their application is necessarily facile. Each may be problematic:

> There is no subject in antitrust law more confusing than market definition. One reason is that the concept, even in the pristine formulation of economists, is deliberately an attempt to oversimplify--for working purposes--the very complex economic interactions between a number of differently situated buyers and sellers, each of whom in reality has different costs, needs, and substitutes. . . .

> By defining the relevant market, however, we identify the firms that compete with each other. Plugged into the market power inquiry, we may then determine whether the alleged anticompetitive activity restrained trade, that is, raised price or reduced output.

SCFC ILC, Inc., 36 F.3d at 966 (internal quotation marks, citations, and alterations omitted). It is well settled that defining the relevant market is an issue of fact, *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986), but we review the district court's grant of summary judgment on that issue de novo. *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999).

Most of the district court's discussion of the relevant product market issue was devoted to explaining why Southwestern Bell's submissions on this issue (arguing that the relevant market included cell phones) were unpersuasive. However, although the inadequacies of Southwestern Bell's relevant market evidence do support the district court's denial of Southwestern Bell's motion for summary judgment on the relevant market issue (which denial Southwestern Bell does not challenge on appeal), they do not support the court's grant of summary judgment on the issue in favor of the Plaintiffs. Because the Plaintiffs had the burden of proof on the relevant market issue, *Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1569 n.15 (10th Cir. 1991), the Plaintiffs were obligated to make an affirmative showing of their proposed relevant market sufficient to sustain a reasonable jury finding. *See McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th Cir. 1998) ("[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element

essential to that party's case in order to survive summary judgment." (internal quotation marks omitted)).

The district court's belief that the Plaintiffs had satisfied their burden was based on its view that certain consumers would not purchase cell phones no matter how much Southwestern Bell raised the rates for pay phone services. We do not believe that such an assertion, even assumed to be true, justifies excluding cell phones from the relevant product market (assuming for the moment that the product market has to be evaluated at the end-user level).

The basic relevant product market test is "reasonable interchangeability." *SCFC*, 36 F.3d at 966. Interchangeability may be measured by, and is substantially synonymous with, cross-elasticity. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *Westman Comm'n Co.*, 796 F.2d at 1221. A market is elastic if demand goes down as price goes up. A market is *cross-elastic* if rising prices for product *A* cause consumers to switch to product *B*.

The district court held that, because "common sense" suggests that there exist *some* people (namely, poor people who use pay phones because they have no phone service at home or work) who would not switch to cell phones if pay phone prices increased, therefore Southwestern Bell's definition of the relevant product market to include cell phones was illogical. The problem with that reasoning is that neither the court below nor the parties on appeal cite anything in the record to support a conclusion that the number of "non-cross-elastic" pay phone users was significant enough to render the market as a whole non-cross-elastic. (Indeed, neither the court below nor the parties in the briefing point to anything in the record to support the district court's conclusion that non-cross-elastic pay phone users exist at all, although surely some must.) Thus, this is not a case where the summary judgment movant (the Plaintiffs)

alleged record-supported facts which the non-movant (Southwestern Bell) failed to rebut.

Therefore, the district court's belief that there are non-cross-elastic pay phone users does not provide a sufficient basis for granting summary judgment in favor of the Plaintiffs as to the scope of the relevant market. The remainder of the district court's stated basis for its ruling is equally unavailing:

> [A]lthough cell phones and pay phones perform similar functions, these items are not reasonably interchangeable. Local calls may be made on a pay phone for approximately thirty-five cents. A pay phone user does not need to make the financial or contractual commitment associated with cellular telephone service. A pay phone is stationary and available to anyone in the vicinity. In contrast, a cell phone is available only to those in possession of such equipment.

Reasonable interchangeability does not depend upon product similarity, a point well summarized in the ABA's treatise on antitrust law:

> Many courts have addressed the situation where two or more products or services have similar functions but different physical characteristics. These cases make clear that the relevant inquiry remains whether the differences in type render the products poor substitutes and that the resolution of this question depends on the evidence in the case. In *du Pont*, for example, the Court concluded that all flexible wrappings belonged in the same market, notwithstanding differences in burst strength, gas permeability, grease resistance, and other factors. The Court based its conclusion upon the extensive competition that existed between cellophane and other

> pliable wrappings, despite cellophane's physical advantages.

1 ABA Section of Antitrust Law, Antitrust Law Developments 508 (4th ed. 1997). Although the product differences cited by the court below are all reasons that the jury might rely upon were it to find that the relevant market did not include cell phones, we cannot agree that such differences support summary judgment on this factual issue.

However, regardless of the interchangeability of pay phones and cell phones at the end-user level, there is no doubt that pay phones and cell phones are not interchangeable at the location-owner level, and that is the level where the Plaintiffs argued that Southwestern Bell has monopolized competition. In other words, the Plaintiffs argue that Southwestern Bell's interchangeability argument is wrongly directed at showing that cell phones and pay phones are interchangeable for end-users, but that is not the market where the Plaintiffs are complaining of Southwestern Bell's anti-competitive behavior. Rather, it is the location owners who define the market where the anti-competitive behavior took place — that is, the Plaintiffs claim that they compete with Southwestern Bell for locations upon which to place their pay phones, and that is the market Southwestern Bell has monopolized.

Southwestern Bell insists that, despite the fact that it competes with the Plaintiffs in supplying pay phones to location owners, the end-user market for telephone services must still be considered. In support of this assertion, Southwestern Bell first argues that "market power must be identified from [the consumer's] perspective." The only support Southwestern Bell offers for this assertion is *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). But *du Pont* does not support the proposition for which it is cited; the Court there merely stated that "[i]n considering what is the

relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that part of the trade or commerce, monopolization of which may be illegal." *Id.* at 395 (internal quotation marks omitted). The reference to consumers makes perfect sense in *du Pont* given that the market at issue (sale of cellophane wrap and other flexible wrappings) indisputably was a consumer market. Although Southwestern Bell is correct that antitrust laws were "especially intended to serve consumers," that hardly suffices to prove that a monopolist may act with impunity so long as end-use consumer prices are unaffected. And, in any event, the Plaintiffs' antitrust theory was that the location owners were consumers of the placement of pay phone facilities on their locations, and that the price for such location placements was affected by Southwestern Bell's monopolistic conduct.

Southwestern Bell also argues that the relevant market should include the end-user market (and thus include cell phones) because pay phone service providers like Southwestern Bell are properly viewed as *buyers* rather than *sellers* in their relationships to location owners. That is, Southwestern Bell argues that the location owners are not "customers" of Southwestern Bell at all; Southwestern Bell argues that it is the customer of the location owners.[3]

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[3] The contracts themselves do not establish whether Southwestern Bell is more properly viewed as the buyer or seller, providing simply that the location owner, in exchange for prescribed commission payments, "hereby grants SWBT the right to install and maintain SWBT public pay telephone(s) and associated equipment . . . at the location specified herein," and that the phone remains the property of Southwestern Bell during the contract period.

Thus, Southwestern Bell attempts to characterize this action as a "monopsony" claim.[4] A monopsony, Southwestern Bell argues, is not actionable unless it "injure[s] consumers by forcing up the price of the end product. Where the risk of that happening is slight or nonexistent, however, monopsony power per se does not create an antitrust concern." *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1203 (W.D.N.Y. 1995). Thus, because the end-users' ability to switch from pay phones to cell phones prevented them from being harmed by Southwestern Bell's monopsony,[5] Southwestern Bell contends that its conduct is not actionable.

On its merits, Southwestern Bell's monopsony argument is unpersuasive. The Supreme Court's treatment of monopsony cases strongly suggests that suppliers (under Southwestern Bell's theory of the market, the location owners) are protected by antitrust laws even when the anti-competitive activity does not harm end-users. In its leading monopsony case, the Supreme Court stated:

> It is clear that the [anti-competitive buyer's price-fixing] agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers. . . . .
>
> The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to

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[4] "Monopsony" is a "condition of the market in which there is but one buyer for a particular commodity." Black's Law Dictionary 1007 (6th ed. 1990).

[5] As stated earlier, at least on this record, the Plaintiffs have not yet demonstrated that cell phones and pay phones are not reasonably interchangeable at the end-user level.

> sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235-36 (1948) (citations omitted). In *Mandeville Island Farms*, the Court held that the plaintiff sugar beet growers had stated a valid monopsony claim under § 2 of the Sherman Act against a sugar beet buyer who colluded with other buyers to pay uniform prices for beets. Significantly, as the two dissenting justices observed, the plaintiffs' complaint did not allege that the defendants' actions affected end-user prices. *Id.* at 247-48 (Jackson, J., dissenting).

Tenth Circuit case law also appears to reject the notion that a monopsony plaintiff must prove end-user impact. In *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951 (10th Cir. 1990), we rejected a monopsony defendant's argument that injury to sellers without injury to end-users is not cognizable antitrust injury. *Id.* at 962; *cf. Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 579-80 (10th Cir. 1961) ("[T]he prolonged existence of a price-fixing conspiracy [by buyers] in an integrated industry such as ours is proof of damages to those [parties] whose prices are directly affected thereby. In that respect, our case is noticeably akin to *Mandeville Island Farms v. American Crystal Sugar*, 334 U.S. 219."). This approach is consistent with the case law of other circuits. *See Khan v. State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996) (Posner, J.) ("This is a form of monopsony pricing, which is analytically the same as monopoly or cartel pricing and so treated by the law. *E.g.*, *Mandeville Island* . . . ." (dicta)), *vacated on other grounds*, 522 U.S. 3 (1997); *United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990) ("[I]t

is theoretically possible to have a middleman who is a monopolist upstream but not downstream . . . .").

An especially insightful analysis of relevant market analysis in monopsony cases comes from the Second Circuit. In *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001), the plaintiffs were managerial, professional, and technical employees who brought a Sherman Act § 1 suit against fourteen major oil companies, alleging that the companies shared information about, and thereby artificially depressed, the salaries paid to such classes of employees. *Id.* at 195. The relevant market issue in *Todd* was slightly different than that at issue here, but the language used by the court in addressing that issue is directly relevant here. In *Todd*, the district court had held that the market proposed by the plaintiffs was over-inclusive to the extent that the plaintiffs had failed to show that the various types of employees within the asserted relevant market (accountants, lawyers, engineers, etc.) were interchangeable with one another. *Id.* at 201. The Second Circuit rejected this conclusion:

> [T]he market is not the market of competing sellers [the employees selling their services] but of competing buyers [the companies buying these services]. This market is comprised of buyers who are seen by sellers as being reasonably good substitutes. A greater availability of substitute buyers indicates a smaller quantum of market power on the part of the buyers in question.
>
> . . . . Plaintiff is right to urge that the proper focus is . . . the commonality and interchangeability of the buyers, not the commonality or interchangeability of the sellers. The question is not the interchangeability of, for example, lawyers with engineers. At issue is the interchangeability, from the perspective of a

> [managerial, professional, or technical] employee, of a job opportunity in the oil industry with, for example, one in the pharmaceutical industry.

Id. at 202 (citations omitted).

Opinions from other courts, as well as the writings of economists, reinforce this view. As Judge Wald summarized in a dissenting opinion:

> The Supreme Court has clearly held that antitrust laws apply not only to restraints on *output* markets, but to *input* markets as well, including both labor, [citation omitted], and input commodities, *e.g.*, [*Mandeville Island Farms*] (sugar refiners' agreement to fix input prices paid for sugar beets violates Sherman Act, which "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers" but instead "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated"). *See also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (Sherman Act prohibits any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity" and agreements to make "purchases [of inputs] at or under the market are one species of [unlawful] price-fixing"); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946) (applying antitrust law to restraints on input market for tobacco as well as output market for tobacco products); *Swift & Co. v. United States*, 196 U.S. 375 (1905) (same, for livestock inputs and meat outputs). *Cf. National Macaroni Mfr's Ass'n v. Federal Trade Comm'n*, 345 F.2d 421, 426 (7th Cir.1965) (purpose and effect of agreement to fix composition of

macaroni product was to depress input price of semolina, thereby violating Sherman Act).

Economists too have long recognized that market inefficiencies created by anticompetitive restraints on input markets can be as destructive of a free market economy (and therefore ultimately damaging to consumers) as restraints on output markets. *See, e.g.*, ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY 36-43 (1993); *see also Mandeville Farms*, 334 U.S. at 241-44 (describing how restraints on input market adversely affect output market). While antitrust prosecutions for restraints on input markets are relatively rare, this is explained by the fact that restraints on input markets arise only in the unusual circumstance of an effective monopsony--a single purchaser, or a group of purchasers acting in concert. And monopsony in turn arises only when the resource is uniquely valuable in its current use, so that even if the price is depressed by monopsony, sellers are unable to find alternative buyers. RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST 150 (1981) (monopsony can arise when "resources hav[e] substantially greater value in some uses than in others" so the "sole purchaser . . . will . . . be able to force the [seller] . . . to accept a monopsony price"); BLAIR & HARRISON, *supra*, at 43-44 (inelasticity of supply facilitates collusive monopsony). Thus, for example, in the *Mandeville Island Farms* case, the sugar refiners' monopsonistic price-fixing scheme was effective because growers could not easily find other buyers or profitably switch to other crops when refiners conspired to fix the price of sugar beets. *See* 334 U.S. at 240-42. Nonetheless, according to the economists, there is a dead-weight

> loss associated with imposition of monopsony pricing restraints. Some producers will either produce less or cease production altogether, resulting in less-than-optimal output of the product or service, and over the long run higher consumer prices, reduced product quality, or substitution of less efficient alternative products. *See, e.g.*, HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 1.2, at 17-18 (1985); BLAIR & HARRISON, *supra*, at 42-43, 72. So, even proceeding from the premise that antitrust laws aim only at protecting consumers, monopsonies fall under antitrust purview because monopsonistic practices will eventually adversely affect consumers.

Brown v. Pro Football, Inc., 50 F.3d 1041, 1061 (D.C. Cir. 1995) (Wald, J., dissenting) (emphasis omitted), *aff'd*, 518 U.S. 231 (1996). The two district court cases cited by Southwestern Bell — both of which contain language suggesting that harm to end-users is at least a relevant consideration in determining whether a monopsony is actionable under antitrust law, *see Kamine/Besicorp Allegany L.P.*, 908 F. Supp. at 1203 (stating that, where there is little risk that monopsony "can injure consumers by forcing up the price of the end product . . . monopsony power *per se* does not create an antitrust concern"); *Addamax Corp. v. Open Software Found., Inc.*, 888 F. Supp. 274, 280 (D. Mass. 1995) (noting that "[o]nly with control of a downstream market can the monopsonist decrease output and raise prices") — are inadequate to overcome the unmistakable import of the case law cited above.

Accordingly, we affirm the district court's summary judgment ruling excluding cellular phones from the relevant market definition. Location owners are the relevant customers for purposes of locating Southwestern Bell's pay phone

facilities, and from the location owners' perspective, cellular phone services and pay phone services are not interchangeable.

B. *Noerr-Pennington* Doctrine

The district court allowed the Plaintiffs to introduce evidence regarding allegedly misleading statements that Southwestern Bell made to the OCC. Southwestern Bell argues that admission of such evidence violated its First Amendment right to petition the government, as embodied in the *Noerr-Pennington* doctrine. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The district court held, and the Plaintiffs argue on appeal, that the evidence was admissible because it was offered, not for the improper purpose of showing that Southwestern Bell violated antitrust laws by misleading the OCC, but rather for the proper purpose of supporting the claim that Southwestern Bell acted for an improper monopolistic purpose (namely, showing that the pre-competition campaign to lock up the market in long-term contracts was done for monopolistic purposes). We conclude that the district court's admission of the evidence was not an abuse of discretion. *See U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1374 (2d Cir. 1988) (reviewing admissibility of evidence under *Noerr-Pennington* doctrine for abuse of discretion).

The Plaintiffs argued to the jury at trial that Southwestern Bell, upon realizing that competition was coming soon, engaged in an all-out effort (referred to as the "Blitz") to lock as many location owners as possible into multi-year, automatically renewing contracts with unreasonable termination fees. Southwestern Bell argued that the Blitz was unrelated to the coming of competition, and was instead merely an effort to take advantage of new federal regulations allowing pay phone service providers to choose the long distance

provider for the pay phone ("PIC rights"). The OCC, the state agency responsible for pay phone operations, considered ordering a "fresh look" rule that would have given location owners a window of time in which to void their existing contracts with Southwestern Bell in order to enter into a contract with another pay phone service provider. The state attorney general supported the fresh start, viewing it as an efficient alternative to fact-finding to determine whether Southwestern Bell was moving to lock up location owners in long term contracts.

Ultimately, the OCC decided against the fresh look, but during the course of its deliberations it submitted the following interrogatory to Southwestern Bell: "Please state whether Southwestern Bell Telephone is attempting to get all current pay-phone customers to sign a new contract. If so please state the reason." Southwestern Bell replied "No. . . . Southwestern Bell is not attempting to obtain new contracts from all site owners that are currently under contract, nor is Southwestern Bell attempting to obtain contracts from all site owners with whom Southwestern Bell does not have a current contract." In a draft answer to this question not submitted to the OCC, Southwestern Bell had drafted "Southwestern Bell Telephone has strived to secure a contract on all pay phones since 1988." The draft answer went on to say that Southwestern Bell's motivation to obtain long-term contracts was to enable it "to secure the placement long enough to protect the large investment." Southwestern Bell's cross-examination of the witness through whom this evidence was presented (Rick Chamberlain, formerly of the Oklahoma Attorney General's office) suggests that its position was that it was not then "attempting" to get "all" customers to sign a new contract, as some of its existing customers already under contract were not contacted during the "Blitz." In addition to objecting to the admission of the interrogatory response, Southwestern Bell

argues generally that Chamberlain's testimony improperly allowed the jury to consider the fact that Southwestern Bell opposed the fresh look proposal.

The *Noerr-Pennington* doctrine is rooted in the First Amendment. As we have explained previously, "the *Noerr-Pennington* doctrine provides general immunity from antitrust liability under the Sherman Act to private parties who petition the government for redress of grievances, notwithstanding the anti-competitive purpose or consequences of their petitions." *Cardtoons, L.C. v. Major League Baseball Players Assoc.*, 208 F.3d 885, 894 (10th Cir. 2000) (en banc). However, *Noerr-Pennington* does not bar the introduction of *all evidence* within its scope, as the Supreme Court recognized in footnote three of its *Pennington* decision: "It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial . . . if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." 381 U.S. at 670 n.3.

Southwestern Bell argued to the trial court prior to introduction of this evidence that, under the *Noerr-Pennington* doctrine, "what we told the Corporation Commission can't support any inference in the case and ought not come in at all." The district court rejected this argument, expressly relying on *Pennington* footnote three. After cross-examining Chamberlain, Southwestern Bell requested, and the court immediately issued over the Plaintiffs' objection, the following cautionary instruction to the jury:

> Every citizen, including the plaintiffs and Southwestern Bell, has a right under the Constitution to petition the government and be heard on issues pertaining to rule-making proceedings like that at the Corporation Commission. The exercise of that right is immune from scrutiny under the antitrust laws.

> Therefore, I instruct you that Southwestern Bell Telephone Company's exercise of it[s] right to petition by participating in rule-making proceedings and advocating any position it chose at the Oklahoma Corporation Commission did not violate the antitrust laws.

Later, the jury was instructed without objection that it may consider the purpose or intent of the anti-competitive act (i.e., the lock up efforts), and its pretextual nature, in assessing its legality. Further, the jury was specifically reminded per jury instruction that Southwestern Bell's communications with the OCC "did not violate the antitrust laws," but that "you may consider this evidence if you find it tends to show the purpose and character of the transactions under scrutiny."

Southwestern Bell argues that introduction of the evidence from the OCC proceedings violated the *Noerr-Pennington* doctrine because it was offered for the sole purpose of convincing the jury to find an antitrust violation based on Southwestern Bell's interactions with the OCC. The Plaintiffs counter that the evidence was not offered to establish monopolistic liability based upon Southwestern Bell's interactions with the OCC, but rather to show that the "purpose" of the Blitz was to stifle competition, and that the explanation Southwestern Bell offered at trial (that the "Blitz" was to secure PIC rights) was pretextual. The Plaintiffs argue:

> In its opening statement and throughout trial, SWBT attempted to convince the jury that the Blitz was intended to secure 'PIC' long distance rights, not to preempt competition as Plaintiffs alleged. But SWBT's response to the OCC's factual inquiry does not contain any 'PIC' rights explanation for the Blitz. It also contradicted a 'draft' response in which SWBT admitted it had been attempting to get all its

> customers under contract for years. Finally, it contradicted testimony from SWBT management that, on the eve of competition, SWBT sent contract solicitation letters to all of its Oklahoma customers not already under contract. SWBT's response (and other evidence) proved SWBT's 'PIC' rights justification was pretextual, and the true purpose of the Blitz was predatory.

Restated, the Plaintiffs' "purpose" rationale for the use of this evidence is that, if the true impetus for the Blitz had been to secure PIC rights, the Plaintiffs would not have submitted a misleading response to the OCC interrogatory. Because the draft response suggests that Southwestern Bell was willing to disclose one innocent explanation for its contracting, the argument goes, it follows that Southwestern Bell also would have relied on the innocent PIC explanation if that had been a motivating factor, and the fact that it did not do so tends to prove that the PIC theory was a post-hoc pretext. This rationale for the evidence's admission falls within the scope of *Pennington*'s footnote three. Whether or not the jury would have found the evidence persuasive on this point, such an inference certainly would have been permissible.

Assuming that there is some proper purpose for admitting Southwestern Bell's interrogatory response and draft response (along with testimony regarding the context of that exchange), Southwestern Bell argues that the evidence still was inadmissible under *Pennington* footnote three because the probative value did not outweigh the prejudice. We disagree. In light of the legitimate purpose underlying the evidence's admission and the cautionary jury instruction given by the

district court, admission of the evidence was not an abuse of discretion.[6]

C. State Action Doctrine

Southwestern Bell argues that "the state action doctrine (or analogous principles of state law) bars any use of SWBT's pre-November 1996 contracts to prove antitrust violations." The district court rejected Southwestern Bell's state action arguments on the ground that the doctrine applies only to federal antitrust claims, not state antitrust claims for which Southwestern Bell was found liable here. State action immunity is a question of law, which we review de novo. *See Trigen-Okla. City Energy Corp. v. Okla. Gas & Elec. Co.*, 244 F.3d 1220, 1225 (10th Cir.), *cert. denied*, 122 S. Ct. 459 (2001). The Supreme Court has stated in the antitrust context that "state-action immunity is disfavored, much as are repeals by implication." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 623 (1992).

We decline to address whether the state action doctrine applies to state antitrust claims. Even assuming that it does, the doctrine's requirements are not met under the circumstances of this case. Private parties regulated by the state must show two elements in order to demonstrate that they are entitled to state action immunity. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy, and second, the policy must be actively supervised by the State." *Trigen*, 244 F.3d at 1226 (internal quotation marks omitted). To meet the first prong, "the state policy does not

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[6] Southwestern Bell's challenges to the other aspects of Chamberlain's testimony fall flat, as the only testimony potentially problematic under *Noerr-Pennington* — the fact that Southwestern Bell opposed the fresh look proposal — was elicited by Southwestern Bell during cross-examination. *See Whiteley v. OKC Corp.*, 719 F.2d 1051, 1055 (10th Cir. 1983).

have to compel the private party to engage in anticompetitive conduct. If the state policy *expressly* permits, but does not compel, anticompetitive conduct, the private party may still qualify for state action immunity." *Id.* (emphasis added). Here, it is clear that no state policy expressly permitted Southwestern Bell to attempt to lock up customers contractually long beyond the November 1996 introduction of competition in an effort to stymie that competition. As the Plaintiffs note, the Oklahoma legislature's 1990 decision to bring competition to the pay phone market (a decision not implemented until 1996) suggests an opposite state policy. The second prong "mandates that the State exercise ultimate control over the challenged anticompetitive conduct." *Id.* (internal quotation marks omitted). Here, the state likely was not even aware of the full extent of Southwestern Bell's lock up conduct, let alone exercising ultimate control over it. The state action immunity doctrine does not apply to this case.[7]

Southwestern Bell offers a cursory alternative argument that the Plaintiffs' claims are barred by the exclusivity of the OCC's jurisdiction. The only authority cited in support of this argument is *Trigen*. However, *Trigen* is obviously distinguishable. All of the state antitrust claims in *Trigen* involved a challenge to rates charged by a regulated utility with a continuing legal monopoly. 244 F.3d at 1228 (stating that "we

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[7] *Cf. Central Telecomm., Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), where the Eighth Circuit rejected a cable provider's argument that "as a matter of law, it could not have possessed monopoly power because [the municipality] regulated price and entry in the cable television business." *Id.* at 726. The court recognized that TCI had the power to raise the price of premium channels without the approval of the municipality and that it "used its entrenched position and . . . various unethical or illegal practices . . . to exclude competition." *Id.* Of course, in the case before us, Southwestern Bell cannot even claim that its long-term contracts with coercive terms and its anti-competitive "Blitz" were regulated, or even known, by the OCC.

construe all of Trigen's state law claims as collateral attacks on [Oklahoma Gas & Electric] filed rates"). The rates charged by the utility were determined by the OCC, not by the utility. *Id.* *Trigen*'s conclusion that a challenge to the state-mandated rates charged by the utility amounted to an unlawful collateral attack was derived from the Oklahoma Constitution's requirement that an "appeal from *an order* of the OCC 'affecting the rates, charges, services, practices, rules or regulations of public utilities . . . shall be to the Supreme Court [of Oklahoma] only . . . .' Okla. Const. art IX,§ 20." *Id.* at 1228 (emphasis added, ellipses in original).

The exclusive jurisdiction of the OCC is not implicated here because, unlike the plaintiff in *Trigen*, the Plaintiffs are not challenging any order of the OCC, or any action by Southwestern Bell mandated by an order of the OCC. The OCC's refusal to impose the fresh look does not imply that it was endorsing Southwestern Bell's lock up campaign. To the contrary, the record suggests that the OCC's ignorance of the lock up campaign's scope may have contributed to its decision not to impose the fresh look. Although Southwestern Bell asserts that "plaintiffs chose not to appeal to the Oklahoma Supreme Court" the OCC's decision not to adopt the fresh look, Southwestern Bell fails to offer any basis for concluding that such an appeal from agency *inaction* was available. *See* Okla. Const. art. 9, § 20. In any event, the Plaintiffs are not complaining about anything the OCC did or did not do. They are complaining about anti-competitive unilateral activity by Southwestern Bell that was neither mandated, nor authorized, nor reviewed, nor even known about by the OCC. Accordingly, we conclude that Southwestern Bell's exclusive jurisdiction argument fails.

D. Market Power through Contracts

Southwestern Bell argues that the trial court improperly allowed the jury to consider the multi-year, automatically renewing contracts between Southwestern Bell and the location owners as evidence of market power. It argues that its contract power was limited because the duration of the contracts from which that power derived was limited; such necessarily temporary control of a market cannot constitute monopoly, it argues. The district court rejected this argument:

> Defendant bases its argument . . . on assumptions rejected by the jury. First, Defendant argues that entry into the pay phone market is easy. As noted by Plaintiffs, such an argument flies in the face of the testimony of numerous witnesses that Defendant's contract activities had imposed substantial barriers to making a profitable entry into the market. Plaintiffs' argument was bolstered by Defendant's own internal memos reflecting an intent to make it hard for competitors to take customers away from Defendant. Further, the very language of Defendant's contracts evidences a persistent control over the market. Weighing the evidence in favor of Plaintiffs as the Court must, there is clear support that Defendant's intent and the actual effect of the contracts was that they can last forever. Not only did Defendant impose significant restrictions on how the contract could be terminated, it also severely restricted who could terminate a contract. Moreover, Defendant's own internal memos reflect its intent that the contracts never terminated but had anniversary dates. This evidence was sufficient for the jury to find Defendant's contracts were more than temporary or transitory. Finally, the jury was presented evidence that even when Plaintiffs secured a location in which

> to place a pay phone, Defendant's actions of quoting high termination fees, removing equipment early, or failing to remove equipment, were directed at preventing the switch. Considering this evidence in the light most favorable to Plaintiffs, it is clear the jury acted reasonably in finding Defendant held a monopoly.
>
> On appeal, Southwestern Bell merely reasserts that temporary contract power cannot constitute monopoly power, making no effort to challenge the district court's conclusion that the jury properly could have concluded that the contracts were meant to, and did, have a non-temporary (indeed nearly permanent) effect. That Southwestern Bell presented evidence from which the jury could have reached the contrary conclusion does not warrant reversal.

Southwestern Bell also argues that the district court erred in refusing to issue the following jury instruction:

> If the evidence demonstrates that the defendant's alleged restrictive, exclusionary or predatory conduct will necessarily be temporary, the defendant will not possess the degree of market power required for the monopolization or attempt to monopolize claim. An example of temporary conduct is conduct that is limited by the duration of a contract.

As given, Southwestern Bell argues, the instructions erroneously permitted the jury to premise monopoly liability on contract power, even if the jury did not accept the Plaintiffs' arguments about the non-temporary nature of the contracts.

We review the court's refusal to give a particular instruction for abuse of discretion. *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 771 (10th Cir. 1999). "We do not

decide whether the instructions are flawless, but whether the jury was misled in any way and whether it had an understanding of the issues and its duty to decide those issues. So long as the charge as a whole adequately states the law, the refusal to give a particular requested instruction is not grounds for reversal." *Id.* (internal quotation marks, citations, and alteration omitted).

Although Southwestern Bell offered its alternative instruction, there is no indication that it objected to the instructions the court did offer. As such, we review the court's instructions for plain error. *United States v. Voss*, 82 F.3d 1521, 1530 (10th Cir. 1996) (applying plain error review where "defendants cite their own proffered instructions, [but] have not indicated a place in the record in which they objected to the court's instruction"); Fed. R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.").

We reject Southwestern Bell's challenge to the instructions, finding that the instructions as a whole were adequate to alert the jury to consider the duration of the effects of any anti-competitive contracts. The jury was told that, in determining "whether any of defendant's practices were predatory or exclusionary," it should consider various factors, including "the duration of any foreclosure of competition caused by [Southwestern Bell's] conduct."

Further, the district court properly rejected Southwestern Bell's proffered instruction, which by listing "conduct that is limited to the duration of the contract" as an example of "temporary conduct," would have misled the jury into believing that any anti-competitive conduct authorized by contract immunizes that conduct from state antitrust scrutiny. That

tendered instruction further incorrectly assumed that contracts of any duration, even those contracts here that could be found to be essentially perpetual, should be considered "temporary" and thereby immune from the antitrust law. Thus, the tendered instruction was misleading and incorrect (as well as unnecessary in light of the correct instructions that were given). Thus, refusing to give that instruction was not error.[8]

E. Damages Based on Future Misconduct

Southwestern Bell argues that the damages awarded below necessarily and impermissibly reflect an award of future damages flowing from future misconduct. The district court rejected this argument:

> [E]ven if Defendant immediately ceased all anti-competitive practices following the verdict, the effects of its prior bad acts would continue. Defendant still holds numerous long-term contracts which affect future competition. There was no suggestion or evidence at trial that those contracts would cease to exist or be terminated by defendant. Additionally, there was evidence of the business growth Plaintiffs would have experienced if allowed to enter a healthy

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[8] *Southwestern Bell cites Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 885 F.2d 683 (10th Cir. 1989), as support, but that case by no means forecloses the consideration of contractual activity in determining monopoly liability. In *Colorado Interstate Gas*, the potential monopolist's market power derived solely from a contract with a fixed expiration date, and the court found this to be an insufficient basis for monopoly liability under the circumstances in light of "the certainty that the market will return to the status quo at a predetermined date and the fact that [the alleged monopolist] has no power to prevent the erosion of its market share." *Id.* at 697 n.24. By contrast, Southwestern Bell's liability was based on a whole system of contracts with exclusionary terms (including provisions that the district court found could cause many of them, in fact, to last forever), as well as an abundance of other anti-competitive conduct.

> market when it was newly opened if not for Defendant's conduct.

We agree that the jury's damages award is proper.

At trial, the Plaintiffs' damages model totaled over $27 million, while Southwestern Bell's damages model was under $1 million. The district court instructed the jury that it "may consider evidence relating to the profits each plaintiff has not received in the past, and will not receive in the future, because of defendant's *past unlawful conduct*" (emphasis added), and forbade the jury to award purely speculative damages. The jury, per general verdict form not objected to by either party, awarded damages of $7,465,450.

Southwestern Bell faces a steep uphill climb in attempting to overturn the jury's damages award. In addressing a challenge to a jury's damages award in an antitrust case, the Supreme Court held that the award "must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931). This court has explained further that:

> We review a district court's disposition of a motion for remittitur or new trial on damages for a manifest abuse of discretion. . . .
>
> > In order to establish an abuse of discretion, the party that moved unsuccessfully for a new trial on the basis of an excessive verdict carries the heavy burden of demonstrating that the verdict was clearly, decidedly, or overwhelmingly against the weight of the evidence. In applying the abuse of discretion standard, we are also mindful that absent an award so excessive or inadequate as to shock

> the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate.

Hynes v. Energy West, Inc., 211 F.3d 1193, 1206 (10th Cir. 2000) (quoting *Campbell v. Bartlett*, 975 F.2d 1569, 1577 (10th Cir. 1992)). We have said that, even where a "persuasive" explanation of the jury's damages award indicates an award contrary to law, the possibility of a proper explanation, "[h]owever slight the chance," will suffice to sustain the damages award. *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1228 (10th Cir. 2000) (rejecting defendant's double recovery claim, even though the damages were precisely the sum of the two amounts that could not be aggregated, because "the jury's award was well within the range of proof"). Against this background, Southwestern Bell's damages arguments fall short.

Both parties agree that, in an antitrust case, future damages may be recovered for past misconduct but not for future misconduct. The Plaintiffs focus their defense of the judgment on the proposition that the jury could have awarded the damages it did solely by reference to past misconduct. Looking only to the pay phone locations that they allegedly had already lost at the time of trial as a result of Southwestern Bell's monopolistic behavior (1,863 pay phones), the Plaintiffs calculate that the total damages flowing from the deprivation of these 1,863 phones was $7,490,187 (roughly $35,000 greater than the jury awarded). Of this number, roughly $2.74 million is profits lost prior to trial, and the remainder is profits lost after trial as a result of Southwestern Bell's continuing enforcement of its contracts with respect to those 1,863 phones.

Southwestern Bell does not challenge the Plaintiffs' arithmetic, but does contest the logical underpinnings of their argument. It contends that the future enforcement of past contracts is future misconduct, not past misconduct. The essence of Southwestern Bell's position is this: "Any damages from existing contracts are avoidable, either by SWBT ceasing to enforce unlawful contracts, or by an injunction barring their enforcement." We do not believe that either ground justifies overturning the damages award.

First, Southwestern Bell contends that damages arising from the future enforcement of the contracts are avoidable because SWBT would stop enforcing "unlawful contracts." Southwestern Bell acknowledges that, as the district court noted, it presented no evidence at trial that it would "ceas[e] to enforce" the contracts, but contends on appeal that "it is absurd to require a defendant, arguing that contracts are legal, to tender witnesses to promise that it would *not* enforce lawful agreements in the future." However, Southwestern Bell never offered in the record *any* assurance that it would cease to enforce its contracts with location owners. Southwestern Bell suggests that such evidence is unnecessary because the law presumes that the antitrust defendant will obey the law, which compels the conclusion that Southwestern Bell would not enforce unlawful contracts. Southwestern Bell offers no authority, binding or otherwise, suggesting that the presumption of lawful behavior extends to the forfeiture of existing contract rights. Indeed, as the Plaintiffs note, they never sought a ruling on the enforceability of individual contracts, nor would such a ruling be proper in the absence of the thousands of contracting third-party location owners in this litigation. Presumably not all of the location owners would want to terminate their contracts with Southwestern Bell. If Southwestern Bell were to decide unilaterally that it would treat the contracts as null and void, it may expose itself to breach of contract claims by the location

owners. This suit was about holding Southwestern Bell accountable to the Plaintiffs for its past monopolistic behavior, and the future enforceability of its contracts vis-a-vis all the location owners was simply not before the court. Under such circumstances, the district court was not obligated to assume that Southwestern Bell would voluntarily terminate its contracts with location owners.

Second, Southwestern Bell argues that the district court erred by upholding damages based upon future enforcement of past contracts rather than entering an injunction forbidding Southwestern Bell to enforce its contracts. As an initial matter, Southwestern Bell does not indicate that it requested or consented to such an injunction either before or after the jury decided the damages issue. Even assuming that the possibility of injunctive relief was raised before the district court, Southwestern Bell offers no support for its position that the possibility of issuing a contract-voiding injunction renders damages based upon continuing enforcement of the contracts improper as a matter of law. Neither of the cases cited by Southwestern Bell supports such a proposition. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697-98 (1978), addressed the quite different question of whether a court *could* injunctively limit an antitrust defendant's free speech rights. The interplay between the money damages for future action and the availability of injunctive relief was not even remotely implicated. The same may be said of the district court case cited by Southwestern Bell, *Board of Regents v. NCAA*, 601 F. Supp. 307 (W.D. Okla. 1984). The case is relevant only in that it provides an example of a decision to enjoin the enforcement of contracts found to violate the antitrust laws. *See id.* at 308. Southwestern Bell offers no relevant authority in support of its argument that the possibility of a contract-avoiding injunction forecloses the availability of damages based on future enforcement of continuing contracts.

We perceive no justification for creating such a rule, and therefore reject Southwestern Bell's argument. As the Supreme Court recognized in *National Society of Professional Engineers*, "[t]he standard against which the [district court's] order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct." 435 U.S. at 698. There is no reason to doubt that the jury's damages award did just that.

CONCLUSION

The judgment below is **AFFIRMED**.[9]

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[9] All outstanding motions are denied.

KELLY, Circuit Judge, dissenting.

I would reverse on three grounds and respectfully dissent. In my view, the district court erred (1) by defining the relevant market on summary judgment, (2) in allowing the jury to base antitrust liability on contracts that were subject to OCC regulation and thereby immune from collateral attack under the state action and exclusive jurisdiction doctrines, and (3) in allowing damages for future enforcement of contracts that are necessarily void as against public policy under the jury's interpretation of the evidence.

1. Defining the Product Market on Summary Judgment.

Plaintiffs prevailed upon their state-law monopolization and restraint of trade claims,[1] which require proof of a relevant

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[1] Okla. Stat. Ann. tit. 79, § 203 provides in pertinent part:

> A. Every act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal.
>
> B. It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce in a relevant market within this state.
>
> . . . .
>
> D. As used in this section:
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> 1. "Monopolize" means:
>
> a. the possession of monopoly power in the relevant market, and
>
> b. the willful acquisition or maintenance of that power by exclusionary conduct as distinguished from growth or development as a consequence of a superior product and/or service, business acumen, or historic accident;
>
> 2. "Monopoly power" means the power to control market prices or exclude competition;
>
> . . . .

See also Harolds Stores, Inc. v. Dillard Dep't Stores, Inc., 82 F.3d 1533, 1543-44 (10th Cir. 1996) (discussing elements of restraint of trade in Oklahoma).

market. "A relevant market is determined by consideration of two elements: (1) A relevant *geographic* market; that is, the geographical territorial area involved; and (2) a relevant *product* market—the type or area of goods or services in which the product which is subject to the restraint effectively competes." *Teleco, Inc. v. Ford Indus., Inc.*, 587 P.2d 1360, 1364 (Okla. 1978) (italics in original). Despite genuine issues of material fact, the district court granted the Plaintiffs' motion for summary judgment on relevant product market. The court defined the relevant market "as the provision of public pay phones and related pay phone services for the territory in Oklahoma in which SWBT operates as a Local Exchange Carrier." Aplt. App. 2149. It did so on the strength of its holding that SWBT's expert's conclusion concerning the interchangeability of pay phones and cell phones was "simply unreasonable given the facts in the record." *Id.*

The district court incorporated its summary judgment ruling in its jury instructions defining the relevant market for the restraint of trade and monopoly claims. Aplt. App. 3470, 3483, 3500. According to this court, "the parties allowed the jury to determine which set of customers should be used in evaluating monopoly power," the pay-phone location owners or the end-users (consumers) of pay-phone services.[2] Ct. Op. at 6.

We readily recognize that the district court could not have properly granted summary judgment on whether the relevant market includes cell phones as well as pay phones. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 468-69 (1992) (non-movant in antitrust case need only prove its inferences are reasonable, as opposed to

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[2] In defining the relevant product market as a matter of law, the district court effectively rejected SWBT's contention that it should be evaluated at the level of the end users. This legal ruling is before us. *See Ruyle v. Continental Oil Co.*, 44 F.3d 837, 841 (10th Cir. 1994).

"economically senseless"). Equally problematic is the district court's exclusion of SWBT's expert testimony on the product market issue without benefit of a *Daubert* analysis. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *see also United States v. Velarde*, 214 F.3d 1204, 1209 (10th Cir. 2000) ([T]he [district] court must, on the record, make *some* kind of reliability determination.") (emphasis in original). Yet this court concludes that "regardless of the interchangeability of pay phones and cell phones at the end-user level, there is no doubt that pay phones and cell phones are not interchangeable at the location-owner level, and that is the level where the Plaintiffs argued that Southwestern Bell has monopolized competition." Ct. Op. at 12; *see also id.* at 20. Without question, the various "levels" of distribution for pay-phone services are implicated.

There is no dispute that defining the relevant market is a factual matter normally entrusted to the trier of fact, here the jury. *See Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 975 (10th Cir. 1990); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986); *Telex Corp. v. Int'l Bus. Machs. Corp.*, 510 F.2d 894, 915 (10th Cir. 1975) (per curiam). The jury should have been allowed to determine the relevant market because there was a factual dispute on summary judgment as to whether Plaintiff's theory was correct. *See* III Aplt. 743-48; V Aplt. App. 1281-83. This court's holding that end-users of phone services do not matter is in considerable tension with the Supreme Court's holdings that the relevant product market is made up of "commodities reasonably interchangeable by consumers for the same purposes," meaning that the cross-elasticity of demand between products must be similar but need not be identical. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *see also United States v. Continental Can Co.*, 378 U.S. 441, 443 (1964); *Brown Shoe Co. v. United States*, 370 U.S.

294, 325 (1962). While it is true that *du Pont* involved a consumer market for cellophane and flexible packaging and that Plaintiffs here allege that the market involves competing for pay phone locations of location owners, neither reason compels the Plaintiffs' definition of the relevant product market.

In *du Pont*, the government accused du Pont of monopolizing the market for cellophane, and the issue before the Court was whether the relevant product market consisted of cellophane alone or all flexible wrappings. *Id.* at 380-81. Notwithstanding the government's attempt to define the relevant market narrowly, the Court held "that cellophane's interchangeability with the other materials mentioned suffices to make it part of this flexible packaging market." *Id.* at 400.

In this case, the Plaintiffs argue for a narrower market, one lacking any interchangeable commodities. *See Eastman Kodak*, 504 U.S. at 481 (holding that a relevant market may consist of a single product or service and must be evaluated from the perspective of the choices available to Kodak equipment owners). It is undisputed that no public cellphones are available to location owners. The contractual support for Plaintiffs' theory—that the SWBT standard contract identifies the location owner as a "customer"—is illusory at best. *See* Aplt. App. 1115-16 (contract); *see also Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1272 (9th Cir. 1975) (relevant products were franchises available to concessionaire, not concession products marketed to consumers or concession services to major league baseball teams). The contracts actually provide that location owners are paid a commission by SWBT for "the right to install and maintain SWBT public pay telephone(s) and associated equipment (payphone equipment)" on their property. Aplt. App. 1115-16 (contract). This suggests that payphone service providers do not sell payphones or payphone services to location owners, but rather sell payphone

services to traditional consumers (end users) and use the location owners as a method of distribution. In any event, as the district court acknowledged and the record confirms, the factual issues surrounding the relevant product market and the perspective from which it should be evaluated were hotly contested on summary judgment. Aplt. App. 2142.

This circuit has cautioned about overly restrictive definitions of the relevant product market, notwithstanding that a potential distributor alleged antitrust injury from a manufacturer's refusal to deal. In *Westman*, a distributor of kitchen equipment alleged that Hobart, a kitchen equipment manufacturer, refused to grant a distributorship in violation of § 1 of the Sherman Act. The district court viewed one type of distribution method ("one stop shopping") as comprising the relevant product market. This court reversed, holding that the relevant product market must be defined by interchangeability of products from the perspective of consumers, not distributors. After noting that "the purpose of the antitrust laws is the promotion of consumer welfare," *Westman*, 796 F.2d at 1220, the court stated:

> In defining the relevant market as "one-stop shopping," the trial court apparently focused on the system of product distribution rather than the market facing the consumer of restaurant equipment. The trial court's focus justified the conclusion that "one-stop distribution" is an effective way to compete in the market. But the fact that "one-stop distribution" is an effective or even superior way to compete does not mean that the relevant market is limited to those who use that method of competition. "Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful."

Id. at 1220-21 (citation omitted). Finding that other restaurant equipment was reasonably interchangeable, the court held "that the relevant product market *at a minimum* consisted of the products generally sold by restaurant equipment dealers, whether or not those dealers carried a wide enough range of products and brands to be classed as 'one stop shopping' distributors." *Id.* at 1221 (emphasis added). Although *Westman* involved a § 1 claim, its holding concerning the relevant market is also fully applicable to a § 2 monopolization claim. *See Thurman Indus. Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1373, 1378 (9th Cir. 1989) (market definition required for § 1 and § 2 claim). The district court's grant of summary judgment in this case foreclosed jury consideration of evidence that showed that cellphones competed for consumers' business, took customers from payphone providers and constrained pricing, all of which could have enabled the jury to conclude cellphones were in the relevant market. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224-25 (1993) (antitrust laws protect against injury to competition, not competitors); *Beville v. Curry*, 39 P.3d 754, 759-60, 764 (Okla. 2001) ("The sine qua non of an antitrust claim is injury to competition.") (emphasis in original), *reh'g granted*, (Oct. 9, 2001). In other words, SWBT was entitled to be heard by a jury on the allegation that it lacked the power to control market prices or exclude competition vis-a-vis the relevant market it contended for. *See* Aplees. Sur-Reply Br. at 6 (arguing that monopoly claim verdict could be affirmed on either theory); *see also Beville*, 39 P.3d at 760 ("Market power is the preliminary threshold inquiry and is often dispositive of antitrust cases."). One need not accept SWBT's monopsony argument to conclude that the relevant market should have been decided by the jury, not the district court. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (holding that proof of relevant market is essential under § 2). The evidence plainly "present[ed] a sufficient disagreement to require submission to

a jury . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986).

2. *Rejecting the State-Action and Exclusive Jurisdiction Doctrines.*

Although this court declines to decide whether the state-action doctrine applies to state antitrust claims, it seems clear that it does apply, contrary to the district court's holding. Aplt. App. 3942-43. Oklahoma's antitrust law is to "be interpreted in a manner consistent with federal antitrust law . . . and the case law applicable thereto." Okla. Stat. Ann. tit. 79, § 212; *see also Teleco, Inc.* 587 P.2d at 1362; *Oakridge Investments, Inc. v. S. Energy Homes, Inc.*, 719 P.2d 848, 850 (Okla. Ct. App. 1986). Nothing suggests that Oklahoma would reject the state-action doctrine which we have applied to federal antitrust claims in similar circumstances. *See Trigen-Oklahoma City Energy Corp. v. Oklahoma Gas & Elec. Co.*, 244 F.3d 1220, 1225-1226 (10th Cir. 2001) (recognizing Oklahoma's policy of allowing regulation instead of competition in electricity sales); *S. Disposal, Inc. v. Tex. Waste Mgmt.*, 161 F.3d 1259, 1263 (10th Cir. 1998) (recognizing Oklahoma's policy of allowing regulation instead of competition in waste disposal services).

This court decides that the state action does not apply to the circumstances of this case because (1) "it is clear that no state policy expressly permitted Southwestern Bell to attempt to lock up customers contractually long beyond the November 1996 introduction of competition in an effort to stymie the competition," and (2) "the state likely was not even aware of the full extent of Southwestern Bell's lock up conduct, let alone exercising ultimate control over it." Ct. Op. at 27-28.

Here, the state plainly made clear its intent to regulate telephone services, including payphone services, until the OCC

permitted competition. *See* Okla. Const. art. IX, §§ 18, 34;[3] Okla. Stat. Ann. tit. 17, § 131 (OCC issues certificate of convenience and necessity); Okla. Stat. Ann. tit. 17, § 139.1 (directing the OCC to "promulgate and enforce operating requirements for coin-activated telephones and credit card-activated telephones available for public use owned or operated by corporation or persons other than telephone corporations authorized by the Commission to operate within service areas."); *Southwestern Bell Tel. Co. v. Oklahoma*, 825 P.2d 262, 265 (recognizing that local exchange companies are a state-created exception to prohibition on monopolies); Aplt. App. 3711-3724 (1985) (OCC 1985 Tariff Order rejecting competitive payphones, and ordering that SWBT "be and hereby is the only authorized provider of coin phone service within its territory."). Rather than concentrating on the particular field of regulation, this court focuses upon the effects of alleged anti-competitive conduct beyond November 1996. But the proper inquiry is whether Oklahoma intended to displace competition in the payphone market with a regulatory program until November 1996. *See S. Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 64-65 (1985). The

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[3] Okla. Const. art. 9, § 18 provides in part:

> The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend.

answer is clear—not until the OCC determined how and when competition could begin did Oklahoma change its policy.

The OCC had ultimate control over SWBT's alleged anti-competitive conduct, which goes to satisfy the two-part *Midcal* test for state action immunity. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) ("First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the state itself.") (citation omitted). Concerning the first part, the state need only permit the conduct to occur—approval is unnecessary. *Trigen*, 244 F.3d at 1226. As discussed above, Oklahoma plainly regulated the field. Concerning the second part, state officials must have and exercise power to review alleged anti-competitive acts. *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

We have twice concluded that Oklahoma's pervasive regulation of electric utilities satisfied the "active supervision" requirement. *See id.*; *Lease Lights, Inc. v. Pub. Serv. Co. of Okla.*, 849 F.2d 1330, 1334 (10th Cir. 1988). In *Trigen*, we based satisfaction of the active supervision requirement on the OCC's regulatory authority. 244 F.3d at 1226. In *Lease Lights*, we looked not only at the OCC's grant of authority but also considered actual proceedings of the OCC. 849 F.2d at 1334.

In this case, not only OCC's regulatory authority, but also its actual proceedings and rulemaking, support the active supervision requirement. Specifically in 1996, the OCC was concerned with competition and addressed it in a formal rulemaking proceeding which resulted in administrative regulations. Aplt. App. 3725 (Notice of Rulemaking) (OCC proposed to establish rules including "what safeguards are necessary to protect the interest of competitive payphone service providers"); Aplt. Add. tab 8 (Okla. Admin. Code. tit,

165, ch. 58 (Facilitation and Provisioning of Payphone Service); *id.* at tab 12 (OCC's Agency Rule Report Establishing Pay Telephone Service Rules).

Tellingly, an assistant attorney general in arguing for the "fresh look" proposal before the OCC stated:

> And it's hard for me to imagine that anyone would seriously argue that existing payphone service contracts are not a significant barrier to new entrants. The incumbent LECs have had decades of monopoly status in order to identify the most lucrative sites within their service territories, and they have had months to gain a competitive advantage through going out and renegotiating those contracts. The payphone rules, we believe, should allow a renegotiation window.

Aplt. Add. tab 11 at 22 (Rick Chamberlain testimony before the OCC);[4] *see also* Aplt. App. 3729-3741 (Oklahoma Attorney General's brief before OCC arguing that OCC had jurisdiction to consider payphone service and the location of payphones and existing LEC contracts were a barrier to competition). Various providers complained to the OCC about the renegotiation tactics of SWBT as hindering competition, even including SWBT's May 1, 1996 letter to location owners. Aplt. App. 3743-3748 (Textel Communications, Inc.'s); 3752-3765 (Cherokee Communications, Inc.). The record reveals that

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[4] The Plaintiffs argue that this transcript should be stricken as it was not before the district court. *See United States v. Kennedy*, 225 F.3d 1187, 1190-91 (10th Cir. 2000). I would grant SWBT's motion to supplement the record pursuant to Fed. R. App. P. 10(e)(2)(C), because the substance of Mr. Chamberlain's comments is contained in his testimony before the district court, Aplt. App. 4622, and the payphone regulatory system in Oklahoma was always an issue in this case. Further, given that the district court held that the state-action doctrine did not apply, inclusion of this transcript in no way results in the appellate court deciding an issue with evidence that might have made a difference to the district court.

parties were divided over the fresh look proposal, whether the OCC had jurisdiction to entertain it, and whether it was constitutional. Ultimately, the OCC voted against adopting it, but indicated its willingness to reconsider the matter with discussion and investigation, at the invitation of the industry. Aplt. Add. tab 12 at 11. All of this suggests that the OCC could and did consider the alleged anti-competitive conduct of SWBC. The fact that the OCC might not have been aware of the full extent of SWBT's alleged anti-competitive conduct (which is pure speculation) or declined to intervene is of no moment—the heart of this case is SWBT's pre-competition contracts which the OCC reviewed and allowed to remain in effect. SWBT's alleged bad acts are insufficient to defeat state action immunity. *See Trigen*, 244 F.3d at 1227 (even if OG&E had committed certain improper acts in the regulated sale of electricity, state action immunity was proper).

The exclusivity of the OCC's jurisdiction over matters concerning payphones is apparent. No appeal was taken from the OCC's decision not to impose a fresh look. Although this court questions whether such an appeal could have been maintained, the constitutional provision allows an appeal "from any action" of the OCC "prescribing . . . practices, rules or regulations" and "by any party affected, or by any person deeming himself aggrieved by any such action . . . ." Okla. Const. art. 9, § 20. This is hardly a limited grant of standing. In the context of the fresh look proposal, the OCC was exercising its constitutional and statutory authority to promulgate the payphone rules and regulations. Aplt. Add. tab 12 at 3. The court's suggestion that an appeal could not have been taken from agency inaction ignores the forest for the trees. Moreover, the Oklahoma Supreme Court has passed on OCC inaction before. *Turpen v. Okla. Corp. Comm'n*, 769 P.2d 1309, 1325 (Okla. 1988) (OCC did not err in deciding to address imputed value issue later). Analogous to *Trigen*, the Plaintiffs' state

antitrust claims based upon pre-November 1996 conduct are nothing more than a collateral attack on the OCC's right to supervise, regulate and control matters relating to the performance of transmission company public duties and of correcting abuses. *See* Okla. Const. art. 9, § 18. A major part of Plaintiffs' case concerns SWBT's pre-competition contracts, which the OCC reviewed and allowed to remain in effect and which plainly come within the OCC's constitutional and statutory jurisdiction.

3. Allowing Damages for Future Enforcement of Contracts

The court is undoubtedly correct that antitrust damages are not subject to a rigorous standard of proof; estimates and reasonable inferences of damages are sufficient. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 567 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). At the same time, an antitrust plaintiff has the burden of proof and damages cannot be speculative. *See Wells Real Estate, inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 816 (1st Cir. 1988). Future damages are permissible, but only to the extent that they are based upon past wrongdoing. *Lawlor v. Loewe*, 235 U.S. 522, 536 (1915).

In Oklahoma, a statutory antitrust action is in the nature of tort, and is not an action on contract. *McDonald v. Amtel, Inc.*, 633 P.2d 743, 745 (Okla. 1981). Here, however, the contracts were integral to the proof of damages. Whether based upon SWBT continuing to enforce its contracts or on the rationale of free and open competition beginning in 1996, the damage award in this case presupposes that SWBT's anti-competitive acts will continue post-verdict and the contracts will continue to be enforced. This assumption is wrong as a matter of law. It must be remembered that the Plaintiffs prevailed upon their state-law restraint of trade claim and that such acts, and contracts which are the product of such acts, are "against public

policy and illegal." Okla. Stat. Ann. tit. 79, § 203(A); *First Nat'l Pictures v. Pappe*, 39 P.2d 526, 530 (Okla. 1934) ("[I]f [a] contract was made in violation of the anti-trust laws, it was an illegal and unenforceable contract"); *see also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 290 (6th Cir. 1898) (holding that contracts where the primary purpose is to restrain trade are void). Plainly, the damage award based upon future damages is inappropriate and inconsistent with the objectives of antitrust law when an injunction against future anti-competitive conduct would solve the problem. *See United States v. Or. State Med. Soc.*, 343 U.S. 326, 333 (1952).

4. Conclusion.

The district court erred in defining the relevant product market and not applying the state action or exclusive jurisdiction doctrines to bar the Plaintiffs' claims arising prior to payphone competition. The damages award represents impermissible future damages based upon future anti-competitive conduct that would be unlawful.

Because a new trial would be required on remand, the district court again would have to consider the admissibility of SWBT's interrogatory answer and its draft response under the *Noerr-Pennington* doctrine. Given that the pre-November 1996 conduct is not actionable and that the district court found that the interrogatory was poorly worded and resulted in an accurate but incomplete response, this line of inquiry would carry an even stronger danger of unfair prejudice than before, even with a limiting instruction. Though it may be admissible under footnote 3 of *Pennington*, such evidence still has to shed some light on "the purpose and character of the particular transactions under scrutiny," *United Mine Workers v. Pennington*, 381 U.S. 657, 670 n.3 (1965), which would include transactions subsequent to November 1996. Plainly, the jury in this case was exposed to the theory that SWBT's

advocacy before the OCC demonstrated its intent to monopolize. Aplt. App. 4708; Aplt. App. 8379-80 (closing argument). Though the district court instructed the jury to disregard an answer espousing this theory, it points to the need for caution with this evidence.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-98-1249-C

TELECOR COMMUNICATIONS, INC.,
an Oklahoma Corporation, et al.,

Plaintiffs

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,
a Missouri Corporation,

Defendant

Filed: March 1, 2000
Robert D. Dennis, Clerk
U.S. Dist Court, Western Dist. of Okla
By_____Deputy

ORDER

In this action, independent pay phone service providers ("PSPs") claim the defendant Southwestern Bell Telephone Company ("SWBT") has engaged in various forms of anti-competitive conduct violating Section 2 of the Sherman Act and 79 Okla. Stat. § 203(B). The PSPs have filed a motion for partial summary judgment seeking ratification of PSPs' definition of the "relevant market" and rejection of SWBT's defense of unclean hands. The PSPs have filed a separate motion asking the Court to strike portions of SWBT's response. The PSPs have also filed a motion to strike witnesses recently added to SWBT's witness list. SWBT has filed a motion for

summary judgment asserting that the PSPs' antitrust claims fail as a matter of law. In addition, SWBT has filed a motion to bifurcate the issue of market definition from all other issues.[1]

1. *PSF's Motion for Partial Summary Judgment*

The PSPs urge the Court to adopt a definition limiting the "relevant market" to the provision of public pay phones and related services to pay phone location owners. The PSPs define a pay phone location owner as the entity that controls the right to install public pay phones at a business or property. The one who uses this public pay phone is an "end user." Because of this arrangement, the PSPs claim that they have two distinct public pay phone customers, the pay phone location owner plus the end user. SWBT argues personal cell phones as well as public pay phones must be included in the definition of the relevant product market. Each side urges the Court to grant partial summary judgment on the issue of the proper definition of a relevant market. SWBT also argues that even using PSPs' definition of relevant market, the undisputed facts show SWBT has no monopoly power. SWBT concludes because the PSPs cannot supply sufficient evidence to sustain a jury verdict, the entry of summary judgment is appropriate, citing *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir.), *cert. denied*, 516 U.S. 987 (1995). *See also* 957 F.Supp. 1184 (D. Nev. 1997) (on remand). SWBT's Response at 12 (Nov. 29, 1999).

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[1] Many of these pleadings have been filed under seal pursuant to a stipulated protective order entered on January 20, 1999. Therefore, to the extent possible, the Court's discussion of the matters presented in all of the motions will be limited to those matters that may be made public.

A. Relevant Market

Although the PSPs acknowledge the definition of a market is a question of fact, the PSPs argue the undisputed facts require a conclusion that the relevant market is consistent with their proposal and that SWBT's definition of the relevant market is unreasonable. In any antitrust action, it is necessary to first define the relevant market and then probe whether an unreasonable restraint of trade has occurred. "The relevant market consists of both a product market and a geographic market." *Bacchus Industries. Inc. v. Arvin Industries, Inc.*, 939 F.2d 887, 893 (10th Cir. 1991). Experts for both sides agree the geographic market is the territory in Oklahoma in which SWBT operates as Local Exchange Carrier ("LEC"). Huettner Report, Griffin Report. Thus, the only real issue for market definition is the product market. "A product market includes those products which are reasonably interchangeable by consumers for the same purpose." *Bacchus Industries,* 939 F.2d at 893. This definition thus considers products that the consumer may substitute for the product in question given a shift in the price, use, characteristics or qualities. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325-26 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); *Teleco*, 587 P.2d at 1364.

> "The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404, 76 S.Ct. 994, 1012, 100 L.Ed. 1264 (1956). We also look to the geographic reach of the group of sales or sellers to determine the relevant market. *Brown Shoe Co. v.*

> *United States,* 370 U.S. 294, 324, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962). Further, "[b]ecause the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the 'relevant market' rests on a determination of available substitutes." *Rothery Storage [& Van Co. v. Atlas Van Lines, Inc.],* 792 F.2d [210] at 218 [(D.C. Cir. 1986), *cert. denied,* 479 U.S. 1033 (1997)].

SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 965 (10th Cir. 1994), *cert. denied sub nom. MountainWest Financial Corp. v. Visa USA, Inc.*, 515 U.S. 1152 (1995). As explained in *Westman Com'n Co. v. Hobart Intern., Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1986), "the purpose of the antitrust laws is the promotion of consumer welfare."

> We adhere to the view that the antitrust laws should not restrict the autonomy of independent businessmen when their activities have no adverse impact on the price, quality, and quantity of goods and services offered to the consumer.

Id. citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21 (1977). Therefore, as shown by the holding in *Westman*, courts should consider the alleged antitrust violation "in light of its effect on consumers, not on competitors." *Westman,* supra.

Both sides have presented an enormous amount of evidence, a review of which shows that they hotly contest the factual issues. The expert witnesses, Huettner and Griffin, each offer their opinions. The PSPs define the relevant product market as the provision of public pay phones and related pay phone services to pay phone locations. Huettner Report, at page 2, Section III A. SWBT defines the relevant product market as

one for "in-transit phone services," which includes both pay telephone services and cellular telephone services. Griffin Report at 2, Section II. SWBT complains that the market must be evaluated "from the standpoint of the purchaser or consumer of payphone services" and complains that the PSPs "definition ignores the person to whom payphone services (and wireless services) are actually sold." SWBT's response at 2-3 (Nov. 29, 1999).

The PSPs and SWBT seek business relationships with a category of customers they call "Payphone Location Owners." Deposition of Mark Koepp, a vice-president of SWBT, p. 22 ll. 8-23, and Affidavit of Charlie Sullivan, ¶ 2. SWBT agrees that it competes with the PSPs for locations. Its records disclose how it perceived the market in August 1990, and its marketing plans for the years 1991 through 1993. Deposition of Gordon Brown, a vice-president with SWBT, p. 231-32.

> Southwestern Bell has two distinct customers in the public market. The customer who is "sold" is the owner of the site where the pay station is located. The second customer is the end user of the pay station.

SWBT's Market Action Plan for the years 1991-1993. *See also* Deposition of Vicki Broaddrick, a SWBT pay phone consultant. Broaddrick testified that SWBT's customers are the ones who control the location and "can be the property owner or the business owner." *Id.* p. 28 ll. 22-25 through p. 301. 4. A SWBT pay phone service representative echoed this description, i.e., that the location owner is the customer. Deposition of Mauricio Cervantes, p. 93 ll. 21-22. SWBT acknowledges these descriptions but maintains the law requires the market to be defined from the standpoint of the consumer. However, as will be explained below even when the product market is "examined from the viewpoint of the end user, a Personal Cell Phone is still not an economic substitute for a

Public Payphone." Huettner Affidavit (Nov. 29, 1999) at 6, ¶ 7.

i. Reasonable Interchangeability

As explained in *du Pont* and its progeny, a product market consists of those items that have "reasonable interchangeability for the purposes for which they are produced – price, use and qualitites considered." *SCFC ILC, Inc.*, 36 F.3d at 958 (citations omitted). The Court will examine these characteristics with regard to the products the parties contend constitute available substitutes.

The experts, Griffin and Huettner, agree on the basic concepts of economic theory. Both experts discuss how a price increase helps define the demand for a product. If there is a price increase accompanied by a drop in product sales, product demand is elastic. The less elastic the demand, the higher the price a consumer will tolerate before demand drops significantly. Demand is said to be cross-elastic where a slight increase in price causes consumers to substitute another product.

Griffin, the expert offered by SWBT, opines that cell phones and pay phones are economically "substitutable" and "functionally interchangeable." Griffin Report at 2, § II. Griffin believes cell phones are easily substituted for pay phones "because the price of cellular has fallen dramatically so that it is priced within the payphone service range." *Id.* Further, "[n]ot only has the cellular equipment price fallen, the cost of a minute of cellular air time has fallen to the level that it competes directly with payphone service." Griffin Report, at three.

Pay phones and cellular phones do perform substantially the same functions. However, there are other attributes of these two types of phone that cannot be ignored. According to

Griffin's observations "both payphones and cellular phones provide customers with in-transit telecommunications services while they are away from their phone at home or at the office. The functional interchangeability of the two is best illustrated by a visit to the airport or a local restaurant where cellular phones are readily substituted for payphones." *Id.* Griffin's illustration employs assumptions that prove his analysis is unreliable. Griffin assumes the "public" has access to telephone service via their homes or offices. Griffin also assumes that the "public" has the economic means by which to obtain cellular phone service. These assumptions are not the sole bases for Griffin's opinion. However, the Court points them out here to show how a faulty premise can skew the results. While it may be true that individuals at airports and restaurants now use their personal cell phones more than a public pay phone, common sense tells us that the wealth of these individuals is not likely the same as those that use a pay phone because it is the only phone available to them. For many, dining out at restaurants and taking plane trips is simply not an economic reality. It logically follows, if one does not have telephone service at home it is more realistic to assume this individual will utilize a pay phone rather than a cell phone.

Despite a price hike on pay phone calls, Griffin avers profits fell causing Griffin to conclude there is "a strong cross elasticity of demand between pay telephones and cellular telephones. The price increase in October/November 1997, triggered a sharp reduction in local payphone messages as more and more consumers substituted cellular for payphones." Griffin Affidavit (Oct. 15, 1999) page 3 at ¶ 3 e. However, this conclusion is inconsistent with the testimony of SWBT's vice-president of finance. This evidence shows a decline in profits not linked to the increase in price.

> Q: When you talk about a decline in business on existing stations, are you talking about a decline

in the number of – is that measured by minutes? Message minutes or messages?

A: Messages.

Q: And message is exactly what? A call or a period of time of a call?

A. Generally what I'm referring to is one call.

Q: And to what do you attribute the decline in messages that occurred between 1996 and 1997?

A. There would be two factors. Actually, there would be three factors. The first is increased competition indicates that there are more phones in the same vicinity of our existing stations, so there are more choices for that end user to make the call, so they might go from – instead of one phone being on the corner, there may be one on each corner, so not as many calls are made from our particular pay phone.

The second piece is that throughout the nineties, wireless phones are more prevalent now, and beginning in 1996 and 1997 we started to lose more calls to wireless phones; so again, the phone is still on the corner, but people aren't stopping to use it. They use their cell phone.

And the third piece is that in some case, that revenue – or the message lost is attributable to the fact that we lost the station, lost the account.

Q: Meaning that you lost it to a competitor?

A: Yes.

Deposition of Ronald Bartnett, p. 39, I. 20 through p. 40 I. 23. Later in his deposition, Bartnett explains SWBT cannot accurately quantify a decline in the volume of calls. When PSPs' counsel asked Mr. Bartnett whether any studies were conducted to learn the "extent to which that decline in messages was due to customers using wireless," Bartnett was not aware of any study SWBT conducted before August 1999. Further, the study that was conducted in August 1999 surveyed customers in Kansas, not Oklahoma. *Id.* at pp. 43 II. 1 through p. 441. 24. Finally, Bartnett testified that the price hike had only a minimal effect.

> Q: I guess my question, then, has to do with whether or not the raising of the cost of a local phone call in October of '97 or thereabouts would have had any effect on the decline in messages on existing stations that you've identified as occurring between 1996 and 1997.
>
> A: Yes, but minimally.
>
> Q: Okay.
>
> A: In that it wasn't raised until late October of 1997. Your question was to the revenue between '96 and '97. Because of the lateness, that didn't have a substantial effect on those two years.

Id. at p. 45 II. 4-14. SWBT tried to measure the extent the various factors had on the decline in messages, but has "no specific information about how much is attributable to those – you know, those particular sources." *Id.* at p. 45 I. 15 through p. 46 I. 11. Even then, SWBT's analysis of this data was performed based on a multi-state region rather than a particular state. *Id.* at p. 48 I. 16-24.

Huettner, the expert for the PSPs, concludes

A Personal Cell Phone and a Public Payphone are not cross-elastic, or economically substitutable, to the end user. Public Payphones and Personal Cell Phones are not interchangeable in either direction repeatedly. Consumers (usually in lower income neighborhoods) can choose to rely on the Public Payphone system in Oklahoma particularly if they have bad credit and/or don't have a home phone. Consumers in more affluent neighborhoods generally have home phones but can afford the sizeable economic commitment to enter the Personal Cell Phone system, without ever having been a significant Public Payphone user. A Public Payphone enables an end user to make a phone call away from home in every instance. A Personal Cell Phone does so only if the end user owns a cell phone. Once a consumer commits to the cellular phone system, that consumer permanently moves out of the Public Payphone product market and into the separate personal cellular phone product market. Except for a dead cell battery or fear of a roaming or excess minute fee, a Personal Cell Phone user usually has no interest in the Public Payphone system. Indeed, SWBT's own researchers have reached this same conclusion:

> "*Once a user has converted to cellular and has made the behavioral changes that are associated with its use, the chances are slim that he or she will go back to using the public telephone system.*"

Of course, the entry of summary judgment is appropriate only where there are undisputed issues of material fact. Fed. R. Civ. P. 56. In the resolution of a motion for summary judgment, a court may not weigh the evidence or make credibility determinations.

> However, that an issue is factual does not necessarily preclude summary judgment. If the moving party shows that there is an absence of evidence to support the plaintiff's case, the nonmoving party bears the burden of producing evidence sufficient to sustain a jury verdict on those issues for which it bears the burden at trial. *Celotex* [Corp. v. Catrett,] 477 U.S. [317] at 324, 106 S. Ct. at 2553. If Rebel's evidence cannot sustain a jury verdict on the issue of market definition, summary judgment is appropriate. *See id* at 325, 106 S. Ct. at 2553-54. This rule does not direct courts to resolve questions of credibility or conflicting inferences. What it requires courts to do is assess whether the jury, drawing all inferences in favor of the nonmoving party, could reasonably render a verdict in favor of the nonmoving party in light of the substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52, 106 S. Ct. 2505, 2510-13, 91 L. Ed. 2d 202 (1986). The determination requires application of the standard that courts apply in motions for a directed verdict or a judgment notwithstanding the verdict. *See id.* at 251, 106 S. Ct. at 2511-12.

Rebel Oil, 51 F. 3d at 1435. In antitrust litigation, expert testimony is helpful "as a guide to interpreting market facts, but it is not a substitute for them." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242-43 (1993). "When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Id.* Griffin reaches conclusions that are not supported by the evidence or common sense. Barnett, SWBT's vice president of finance, could not establish the correlation between the increase in the price of a pay phone call and the decline in pay phone usage. Even the

studies that SWBT conducted to find a correlation were not limited to the geographic market involved here and have no persuasive effect. In addition, Bartnett attributed the decline in messages to three main factors: price increases, increased presence of cell phones, and competition. Griffin concludes that cell phones and pay phones are interchangeable and thus we must include both in the definition of the relevant product market. However, as discussed above, although cell phones and pay phones perform similar functions, these items are not reasonably interchangeable. Local calls may be made on a pay phone for approximately thirty-five cents. A pay phone user does not need to make the financial or contractual commitment associated with cellular telephone service. A pay phone is stationary and available to anyone in the vicinity. In contrast, a cell phone is available only to those in possession of such equipment. On balance, Griffin's opinion is simply unreasonable given the facts in the record. A pay phone is not reasonably interchangeable with a cell phone. Therefore, the Court must define the relevant market as the provision of public pay phones and related pay phone services for the territory in Oklahoma in which SWBT operates as a Local Exchange Carrier. The PSPs' motion for partial summary judgment on this ground will be granted in part.

B. Defense of Unclean Hands

As a defense to the PSPs' anti-trust claims, SWBT asserts that the PSPs have unclean hands, i.e., engaged in improper conduct. The PSPs urge the Court to grant them partial summary judgment on this defense because it is not applicable to a private anti-trust claim, *citing Kiefer-Stewart Co. v. Joseph E. Seagram and Sons*, 340 U.S. 211 (1951), *rehearing denied*, 340 U.S. 939 (1951). *See also Adolph Coors Co. v. A & S Wholesalers, Inc.*, 561 F.2d 807 (10th Cir. 1977). In addition, the PSPs suggest that even if this defense does apply to the

claims made in this action, the facts will not be sufficient to establish such a defense.

In its response to this portion of the PSPs' argument, SWBT explains that it did not intend to assert the defense of unclean hands with regard to PSPs' claim for damages pursuant to a violation of anti-trust laws. Instead, SWBT explains that this defense is asserted as to PSPs' claim for equitable relief. *See Columbia Pictures Industries, Inc. v. American Broadcasting Companies, Inc.*, 501 F.2d 894, 898 (2nd Cir. 1974).

Because the defense of unclean hands may be asserted as to any equitable claims made by the PSPs, the Court finds that the PSPs' motion for partial summary judgment must be denied.

2. *PSPs' Supplemental Evidence*

On January 21, 2000, the PSPs filed a pleading which purportedly contained supplemental evidence in support of the motion for partial summary judgment and an alternative request for leave to file such information if such leave is necessary. On February 8, 2000, SWBT filed an objection to this pleading. Because SWBT was able to be fully heard on this evidence in its objection, it has suffered no prejudice and the Court will overrule SWBT's objection.

3. *PSPs' Motion to Strike Portions of SWBT's Response*

On December 13, 1999, the PSPs filed a motion to strike portions of SWBT's response. On January 3, 2000, SWBT filed an objection. However, because the Court could resolve the motion for partial summary judgment without review of the materials to which the PSPs object, the motion will be denied as moot.

4. *SWBT's Motion to Bifurcate*

On February 3, 2000, SWBT filed a motion to bifurcate. SWBT asks the Court to first conduct a trial to determine the relevant product market. However, because the Court will grant the PSPs' motion on this topic, SWBT's motion will be denied as moot.

5. *SWBT's Motion for Summary Judgment*

In a separate motion filed on behalf of SWBT, it urges the Court to enter summary judgment. SWBT contends that the anti-trust claims must fail as a matter of law because the PSPs will not be able to prove their version of the definition of relevant market. Further, even if there is a market like that defined by the PSPs, SWBT argues the PSPs will not be able to establish that SWBT has achieved monopoly power under either the federal or the state laws. The PSPs have responded in opposition to all of these arguments. The Court has determined the relevant product market (the topic raised by the PSPs' motion for partial summary judgment). However, there are disputed issues of material fact regarding whether the conduct constitutes any violations of the anti-trust laws. The issues that remain for trial include whether there has been interference or restraint of trade. Therefore, this motion must also be denied.

6. *PSPs' Motion to Strike Witnesses*

The PSPs request an order striking four witnesses whose names appear in the revised witness list SWBT recently submitted. The PSPs complain that these witnesses have not been deposed and the trial date is imminent.

SWBT responds that the addition of these witnesses will not significantly alter the trial and is not an attempt to circumvent the Court's previous directives. SWBT explains that Lawrence Edmison may not be called if witness Cody Graves testifies. Further, if the Court grants SWBT's motion in limine concerning Rick Chamberlain and Bob Anthony, SWBT

will not call Edmison or Graves. Malik Mohammend Islam will not be called if Letha Nail is called. SWBT explains both Islam and Nail have the same factual knowledge and the PSPs have deposed Nail. With regard to the remaining witness, Jodale Fisher, if the Court grants SWBT's motion in limine prohibiting testimony about general, and not specific, matters, Fisher's testimony will not be necessary.

None of these explanations is sufficient to explain or excuse SWBT's failure to disclose witnesses as required by the scheduling order. As each party is fully aware, "[e]xcept for good cause shown, no witness shall be permitted to testify and no exhibit will be admitted in any party's case in chief unless such witness or exhibit was listed in the letter of transmittal." Scheduling Order, at ¶ 5 (b) (Jan. 7, 1999). In the absence of the required showing of good cause, PSPs' motion to strike witnesses is granted.

Conclusion

IT IS THEREFORE ORDERED, for the reasons stated above, the PSPs' motion for partial summary judgment [docket entry #131] is granted in part. The relevant market is defined as the provision of public pay phones and related pay phone services for the territory in Oklahoma in which SWBT operates as a Local Exchange Carrier. PSPs' motion to strike portions of SWBT's response [docket entry #152] is denied; SWBT's objection to the PSPs' supplemental evidence [docket entry #183] is denied; SWBT's motion to bifurcate [docket entry #168] is denied; SWBT's motion for summary judgment [docket entry #135] is denied; PSPs' motion to strike witnesses [docket entry #162] is granted.

IT IS SO ORDERED this 1st day of March, 2000.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-98-1249-C

TELECOR COMMUNICATIONS, INC.,
an Oklahoma Corporation, et al.,

Plaintiffs

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,
a Missouri Corporation,

Defendant

ORDER

In this action, plaintiffs independent pay phone service providers ("PSPs") claim the defendant Southwestern Bell Telephone Company ("SWBT") has engaged in various forms of anti-competitive conduct violating Section 2 of the Sherman Act and 79 Okla. Stat. § 203(B). With regard to the PSPs' motion for partial summary judgment, the Court partially granted the motion, defining the relevant market as the provision of public pay phones and related pay phone services for the territory in Oklahoma in which SWBT operates as a Local Exchange Carrier. Additionally, the Court granted the PSPs' motion to strike certain witnesses. However, the Court denied the PSPs' motion to strike portions of SWBT's response, SWBT's objection to the PSPs' supplemental evidence, and SWBT's motion for summary judgment. The Court now rules on the parties' various motions in limine.

The PSPs first ask this Court to exclude the testimony of three of SWBT's expert witnesses, relying on *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). As to the testimony concerning exclusion of 7,000 "uneconomic" pay phones from the relevant market, the PSPs' motion is denied. The relevant market has been defined to include SWBT's Oklahoma pay phones, with no limitations concerning the questionableness of their economic impact on the market. Further, this Court does not doubt that these additional pay phones will in some way affect the market shares at issue.

Second, the PSPs request the Court exclude Murry's and Griffin's opinions on cell phones and the effect of cell phones on the "end users." This Court partially grants the motion. The relevant market has been defined to exclude cell phones. However, the market also includes the pay phone location owner, for which the parties to this litigation also compete. Thus, the motion is denied insofar as it is inconsistent with the defined market.

Third, the PSPs ask the Court to exclude Murry's and Griffin's testimony regarding justification for SWBT's restrictive contract clauses. The four clauses at issue are the termination fee clause and multi-year term clause, the roll-over clause, the collocation clause, and the information restriction clause. The Court denies this motion. The experts' explanation of their theories could be of help to the jury, and the Court can issue any appropriate limiting instructions where necessary.

PSPs' second motion in limine concerns the exclusion of seven opinions given by Greg Gullo and one opinion from Steve Wilsey. The Court denies this second motion in limine, noting that the PSPs intend to produce similar testimony, also from an accountant (not an economist). As long as the experts

are qualified and their opinions well grounded, nothing in their particular job title precludes their testimony.

PSPs' third motion in limine requests the Court to exclude any reference or suggestion that plaintiffs' contracts establish SWBT's contracts are either in line with industry standards or prove a business justification. The PSPs, as noted by SWBT, fail to cite any authority in conjunction with this argument. Thus, the Court must deny the PSPs' third motion in limine.

PSPs' fourth and fifth motions in limine concern, respectively, evidence that a judgment in this case would somehow affect rates paid by SWBT customers and evidence that treble damages will be awarded in the event the jury returns a judgment for the plaintiffs. SWBT reports it has no intention of offering such evidence. Therefore, the Court grants both motions, as they have been conceded.

SWBT also files two motions in limine. The first motion involves the exclusion of a report provided by PSPs' expert Rick Chamberlain, an Oklahoma City lawyer. Because the potential admissibility of this evidence is unclear from the current documentation in the hands of the Court, the Court chooses to put this issue on hold until a later, more appropriate date. SWBT's first motion also urges the exclusion of both David Huettner's report and testimony and David Payne's damage calculations. The Court hereby denies the motion as to Mr. Huettner, noting that one of SWBT's own experts testified that none of Huettner's conclusions were outside the scope of economic theory. The Court also denies the portion of the request concerning Mr. Payne, despite SWBT's argument that his calculation improperly includes pre-judgment interest. His testimony can be clarified and objected to at trial.

In a second motion in limine, SWBT asks this Court to consider exclusion of evidence in four separate categories. First, SWBT requests the Court to exclude evidence concerning

the state action doctrine. The Court will deny this motion as this evidence is relevant, at least during the time period preceding pay phone competition.

Second, SWBT requests the exclusion of all evidence of its efforts to remove its own pads, posts, and pay phone equipment upon the termination of SWBT contracts with pay phone providers. The PSPs argue this evidence indicates SWBT's intent to increase the costs faced by competitors. The Court denies this portion of the motion. This evidence is more relevant than not.

Third and fourth, the Court evaluates SWBT's request to limit evidence of any bad acts to those events disclosed during discovery and to exclude any evidence of SWBT's net worth on the ground that it is irrelevant. The Court finds if the plaintiffs failed to respond to or supplement legitimate discovery requests, plaintiffs' evidence of the targeted bad acts will not be allowed. Turning to SWBT's motion with regard to its net worth, the Court makes these observations and rulings. In support of its argument to exclude evidence of net worth, SWBT cites *Park v. El Paso Board of Realtors,* 764 F.2d 1053, 1068 (5th Cir. 1986) and *Multiflex, Inc. v. Samuel Moore & Co.,* 709 F.2d 980, 996 (5th Cir. 1983). However, in its review of the cited authority, the Court finds no support for the conclusion reached by SWBT. In any event, this type of evidence is obviously relevant in this anti-trust action.

Conclusion

IT IS THEREFORE ORDERED, for the above stated reasons, the Court rules on all motions in limine, granting in part, denying in part, and deferring in part, as more fully set forth above.

IT IS SO ORDERED this 23rd day of March, 2000.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case Number CIV-98-1249-C

TELECOR COMMUNICATIONS, INC.,
an Oklahoma Corporation, *et al.*,

Plaintiffs,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,
a Missouri Corporation,

Defendant.

Filed:January 31, 2001
Robert D. Dennis, Clerk
U.S. Dist Court, Western Dist. of Okla
By_____Deputy

ORDER

Before the Court is Defendant's Motion for a New Trial on Damages or, in the Alternative, for *Remittitur*. Plaintiffs filed a Response. Defendant filed a Reply to which Plaintiffs filed a Sur-Reply. The matter is now at issue.

I. BACKGROUND

Plaintiffs brought this action alleging Defendant violated various antitrust laws in its marketing of pay telephone service. Prior to November 1996, Defendant was the sole provider of pay telephone service for the area. Beginning in November of 1996, the Oklahoma Corporation Commission opened the

market to competition. According to Plaintiffs when they attempted to enter the market they found Defendant engaging in various antitrust activities preventing their entry. Plaintiffs then filed the present action.

The jury entered a verdict in favor of Plaintiffs on their claims of monopoly and restraint of trade in violation of state law and awarded Plaintiffs monetary damages. Defendant now brings the present motion, pursuant to Fed. R. Civ. P. 59, seeking a new trial on the issue of damages, arguing the jury's award was unsupported by the evidence. Defendant alternatively argues the jury's verdict is excessive and should be reduced.

II. STANDARD OF REVIEW

Defendant faces a substantial burden in its request for a new trial. Once an issue has been determined by a jury the Court should exercise great care in setting that verdict aside. *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1559 (11th Cir. 1984). A verdict should be set aside only if unsupported by evidence or premised on prejudicial error. *Holmes v. Wack*, 464 F.2d 86, 88-89 (10th Cir. 1972). The burden in establishing that error is on the moving party. *Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275, 1284 (10th Cir.), *cert. denied*, 528 U.S. 814 (1999).

III. DISCUSSION

Defendant's first proposition in support of its request for a new trial on damages is that the verdict is improperly based on future damages for future bad conduct. Defendant raises three arguments in support of this allegation: 1) the law precludes recovery of damages for future misconduct; 2) the only theory of future damages presented to the jury was dependent on an assumption of future misconduct; and 3) Plaintiffs failed to present a permissible damages theory. Defendant next argues there was insufficient evidence to support the verdict and error in the jury instructions entitling

it to a new trial on the issue of damages. In the alternative, Defendant seeks an order of *remittitur* from the Court awarding Plaintiffs only their past damages.

A. *Improper Damage Theory.*

Defendant argues the jury verdict must be set aside because it is based on a theory impermissible under the law. At the heart of Defendant's complaint is its assumption that the jury awarded damages based upon future illegal conduct. Defendant's argument is flawed at it rests on a faulty premise. Defendant's argument assumes the existing contracts have no affect on the market beyond the date of trial. Plaintiffs presented evidence from which the jury could find that Defendant's anti-competitive actions limited their entry into the market, including evidence that Defendant's past conduct – manner of securing the contracts, use of the LOA procedure, restrictive terminations, refusal to remove equipment, removing equipment in such a manner that installation of new equipment was difficult or impossible – so limited competition that Plaintiffs suffered substantial future losses. Contrary to Defendant's assertions, such a decision is in perfect harmony with *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), and *Lawlor v. Loewe*, 235 U.S. 522 (1915). In both of those cases the Supreme Court recognized the permissibility of future damages based on past conduct.

> [I]f a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date.

Zenith Radio Corp., 401 U.S. at 339. Earlier the Supreme Court had reached a similar conclusion stating, "[d]amages accruing since the action began were allowed, but only such as were the

consequence of acts done before and constituting part of the cause of action declared on." *Lawler,* 235 U.S. at 536. In the case at bar, Plaintiffs presented evidence demonstrating they suffered future damage due to the effect of Defendant's past conduct.

Likewise, Defendant's argument based on *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 745 F.2d 441 (7th Cir. 1984), does not mandate a new trial. Defendant argues that case requires the verdict be set aside because the verdict assumes Defendant will continue its improper exclusionary activity into the future. To reach the verdict, it was not necessary for the jury to assume Defendant would continue to act as it had before the trial. Rather, even if Defendant immediately ceased all anti-competitive practices following the verdict, the effects of its prior bad acts would continue. Defendant still holds numerous long-term contracts which affect future competition. There was no suggestion or evidence at trial that those contracts would cease to exist or be terminated by Defendant. Additionally, there was evidence of the business growth Plaintiffs would have experienced if allowed to enter a healthy market when it was newly opened if not for Defendant's conduct. Each of these issues was presented to the jury and argued against by Defendant. That the jury chose to believe, at least in part, Plaintiffs' argument, is not grounds for setting aside the verdict.

Defendant points to testimony from Plaintiffs' witnesses, Dr. Huettner and David Payne. According to Defendant, the testimony of these witnesses only provided the jury with a theory of future damages that arises from future misconduct. However, as pointed out through the direct and cross-examination of these witnesses, as well as Defendant's experts, the calculations were based on phones lost by Plaintiffs as a result of Defendant's conduct in locking up the market with long-term contracts. Defendant vigorously cross-examined Plaintiffs' witnesses on these issues and pointed out several

alleged flaws in Plaintiffs' calculations. Defendant then repeatedly called the jury's attention to the claimed errors. In conjunction with the previously discussed evidence of Defendant's past conduct the jury was provided evidence by which damages could be calculated in accord with the jury instructions.

As its final improper theory argument, Defendant asserts Plaintiffs' failure to present a proper instruction or verdict form forced the jury to speculate as to the amount of future lost profits. According to Defendant there was no evidence from which the jury could award future lost profits based on past unlawful conduct. Thus, argues Defendant, as the jury was forced to speculate as to the amount of damages, the verdict must be set aside. While it serves no purpose to repeat the evidence summarized previously, the Court's previously explained conclusion, that Plaintiffs' evidence that their future lost profits were as a result of Defendant's past activity, supports the jury verdict. Mr. Payne testified that he calculated damages based on revenue that could have been earned from phones lost as a result of Defendant's anti-competitive conduct. This analysis clearly fits within the Court's instructions on measuring damages. To the extent Defendant challenges the chart used by Dr. Huettner, its argument is without merit as the exhibit was entered without objection. *See Questar Pipeline Co. v. Grynberg*, 201 F.3d 1277, 1282-83 (10th Cir. 2000) (upholding jury verdict based on exhibit containing disputed measurement of damages where no objection to the exhibit was made).

B. Jury Instructions and Verdict Form.

Defendant also challenges the instructions given to the jury. Defendant continues to argue that the verdict must of necessity contain some amount of impermissible future damages and since the verdict was a general verdict it cannot

be separated into proper and improper amounts. Therefore, argues Defendant, the verdict must be set aside in its entirety. For the reasons stated earlier, the evidence at trial supports the verdict; therefore, it will stand.

C. Sufficiency of the Evidence.

Finally, Defendant challenges the evidence presented to the jury. According to Defendant, the testimony of Dr. Huettner and Mr. Payne was shown to be based on flawed assumptions and generally unreliable as demonstrated by the testimony of Defendant's witnesses. On that basis, Defendant argues the verdict must be set aside. It is hornbook law that determinations of the credibility of a witness is for the jury. *Kitchens v. Bryan County Nat'l Bank*, 825 F.2d 248, 251 (10th Cir. 1987) (citing *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144 (10th Cir. 1978)) ("The jury, moreover, has the exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in the evidence, and reaching ultimate conclusions of fact."). Therefore, as Defendant's argument is nothing more than an argument contesting the believability of Plaintiffs' witnesses and exhibits, the argument must be rejected.

Defendant also seeks a *remittitur* arguing the verdict was excessive. The jury verdict was well within the range supported by the evidence presented at trial. "The jury's award will be considered inviolate so long as it is not 'so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial.'" *Palmer v. City of Monticello*, 31 F.3d 1499, 1508 (10th Cir. 1994) (*quoting Specht v. Jensen*, 832 F.2d 1516, 1528 (10th Cir. 1987)). Thus, *remittitur* is not warranted.

IV. CONCLUSION

Despite Defendant's argument to the contrary, Plaintiffs presented proper evidence to the jury by which the jury could award future damages based on Defendant's past conduct. Defendant has failed to demonstrate error in the Court's instructions or the jury's verdict. The jury's verdict is within the range of the evidence and does not shock the conscience of the Court, therefore *remittitur* is unwarranted. For these reasons, Defendant's Motion for a New Trial on Damages or, in the Alternative, for *Remittitur* is DENIED.

IT IS SO ORDERED this 31st day of January, 2001.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case Number CIV-98-1249-C

TELECOR COMMUNICATIONS, INC.,
an Oklahoma Corporation, *et al.*,

Plaintiffs,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,
a Missouri Corporation,

Defendant.

Filed: January 31, 2001
Robert D. Dennis, Clerk
U.S. Dist Court, Western Dist. of Okla
By_____Deputy

ORDER

Before the Court is Defendant's Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial. Plaintiffs filed a Response. Defendant filed a Reply to which Plaintiffs filed a Sur-Reply. The matter is now at issue.

I. BACKGROUND

Plaintiffs brought this action alleging Defendant violated various antitrust laws in its marketing of pay telephone service. Prior to November 1996, Defendant was the sole provider of pay telephone service for the area. Beginning in November of 1996, the Oklahoma Corporation Commission ("OCC") opened the market to competition. According to Plaintiffs when they

attempted to enter the market they found Defendant engaged in various antitrust activities preventing their entry. Plaintiffs then filed the present action.

The jury entered a verdict in favor of Plaintiffs on their claims of monopoly and restraint of trade in violation of state law. Defendant raised various arguments for judgment as a matter of law at trial. Defendant now brings the present motion, pursuant to Fed. R. Civ. P. 50, seeking judgment as a matter of law, arguing the evidence at trial was insufficient to support the claims. Defendant alternatively seeks a new trial alleging the jury's verdict is against the clear weight of the evidence.

II. STANDARD OF REVIEW

"[I]n considering a motion for a directed verdict, the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party." *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554 (1990) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). "[I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 131, 120 S.Ct. 2097, 2110 (2000) (*citing Lytle*, 494 U.S. at 554-555; *Liberty Lobby, Inc.*, 477 U.S. at 254; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, n. 6 (1962)).

III. DISCUSSION

Defendant raises four specific arguments in support of its motion. First, Defendant claims Plaintiffs' monopolization claims were tainted by improper reliance on pre-November 1996 conduct by Defendant. Second, Defendant claims the Court erred in admitting pre-November 1996 statements made by Defendant to the OCC. Third, Defendant asserts the OCC's

actions and the state regulatory scheme preclude any claim of anti-trust violation. Finally, Defendant argues it is entitled to judgment in its favor or a new trial on the issue of restraint of trade.[1]

A. The Monopolization Claims.

Defendant argues the evidence cannot support the jury's verdict that it held a monopoly. According to Defendant, because its contracts were limited in time, it held only a temporary monopolization ability. Defendant argues the evidence before the jury demonstrated only a temporary monopoly power which was limited by the life of the contracts. As noted by the Court in ruling on Defendant's requested jury instructions, whether Defendant's monopoly was temporary or persistent was a matter for argument by counsel. The Court instructed the jury on the elements required to find a monopoly. Defendant has failed to provide any evidence demonstrating the jury failed to follow those instructions.

Defendant bases its argument that Plaintiffs failed to prove a monopoly on assumptions rejected by the jury. First, Defendant argues that entry into the pay phone market is easy. As noted by Plaintiffs, such an argument flies in the face of the testimony of numerous witnesses that Defendant's contract activities had imposed substantial barriers to making a profitable entry into the market. Plaintiffs' argument was bolstered by Defendant's own internal memos reflecting an intent to make it hard for competitors to take customers away from Defendant. Further, the very language of Defendant's contracts evidences a persistent control over the market.

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[1] At the outset, the Court notes Plaintiffs argue Defendant has waived certain of its arguments by failing to raise them in an earlier motion. Because the Court resolves Defendant's claims in Plaintiffs' favor it is unnecessary to resolve the waiver dispute.

Weighing the evidence in favor of Plaintiffs as the Court must, there is clear support that Defendant's intent and the actual effect of the contracts was that they can last forever. Not only did Defendant impose strict restrictions on how the contract could be terminated, it also severely restricted who could terminate a contract. Moreover, Defendant's own internal memos reflect its intent that the contracts never terminated but had anniversary dates. This evidence was sufficient for the jury to find Defendant's contracts were more than temporary or transitory. Finally, the jury was presented evidence that even when Plaintiffs secured a location in which to place a pay phone, Defendant's actions of quoting high termination fees, removing equipment early, or failing to remove equipment, were directed at preventing the switch. Considering this evidence in the light most favorable to Plaintiffs, it is clear the jury acted reasonably in finding Defendant held a monopoly.

Defendant argues Plaintiffs improperly relied upon the lawful monopoly it held prior to November of 1996, to demonstrate it held an illegal monopoly power. However, Plaintiffs' focus was not on Defendant's position as a pay telephone provider but rather the actions taken by Defendant to maintain its position following opening of the market to competition. Further, contrary to Defendant's argument, antitrust liability can exist even in a regulated market. *See MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1103 (7th Cir. 1983). Finally, liability for antitrust violations exists for improper actions to maintain a monopoly. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also Board of Regents v. NCAA*, 561 P.2d 499, 507 n. 26 (Okla. 1977). There was sufficient evidence presented at trial to support Plaintiffs' argument that Defendant's actions were intended to unlawfully maintain that monopoly once competition began.

B. The Pre-November 1996 Statements.

Defendant asserts the admission of its draft and final answers to the OCC regarding its pre-November 1996 contracting efforts was overly prejudicial. Defendant further argues the Court's instruction was ineffective to protect it from prejudice. To support its position, Defendant relies on the Noerr-Pennington doctrine.[2] Under that doctrine, a litigant enjoys First Amendment immunity from antitrust liability based on statements made to a governing body. According to Defendant, the statements made to the OCC fall within the protection of Noerr-Pennington and cannot be the basis for liability. The Court's limiting instruction specifically instructed the jury that Defendant's statements to the OCC could not be the basis of liability. The Court further instructed the jury that they could consider the statement to show the purpose and character of the transactions. Such an instruction falls squarely within an exception noted by the Supreme Court in *United Mine Workers v. Pennington*, 381 U.S. 657, 671 n.3 (1965) ("testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."). The Tenth Circuit has likewise recognized that consideration of evidence in this manner does not violate Noerr-Pennington. "The proceedings in court and the proceedings before the ICC, while they have evidentiary value as to defendants' objects and motives, are not per se violations of the antitrust laws." *Webb v. Utah Tour Brokers Association*, 568 F.2d 670, 672 (10th Cir. 1977). The instructions to the jury properly stated the applicable law. Defendant has offered no

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[2] The doctrine was developed from *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

evidence the jury failed to follow the instructions. Therefore, Defendant's claim of error must fail.

C. Oklahoma Corporation Commission and State Regulatory Scheme Bar Antitrust Claims.

Defendant next argues the jury verdict must be set aside, as Oklahoma law bars state antitrust liability based on conduct that is controlled by the state. According to Defendant, the same issues presented by Plaintiffs to the jury in this case were previously presented to the OCC by the state Attorney General. The OCC found no reason to cancel Defendant's existing contracts. Thus, argues Defendant, if the jury verdict is allowed to stand it will have the effect of usurping the regulatory role of the OCC.

Defendant overlooks the premise behind the state action doctrine. At the core of that doctrine are issues of federalism. *Southern Disposal, Inc. v. Texas Waste Management,* 161 F.3d 1259, 1262 (10th Cir. 1998). Consequently, the cases that have applied the doctrine have done so when federal antitrust law – not state antitrust law – was the basis for the claim. Defendant has cited no Oklahoma case recognizing application of the state action doctrine in a matter premised on Oklahoma antitrust law.

Further, as noted earlier, antitrust liability can lie for actions taken while regulated. *MCI Communications,* 702 F.2d at 1103. Additionally, there was evidence at trial from which the jury could find Defendant exercised monopoly power following November 1996, well after the OCC addressed Defendant's actions.

D. Insufficient Evidence to Support Verdict on Restraint of Trade Claims.

In its final argument, Defendant attacks the jury's verdict finding it engaged in unlawful restraint of trade. However, Defendant fails to raise any new argument or issue in support

of this proposition. Rather, Defendant argues the errors in regard to the monopoly claims are sufficient to also warrant reversal of the restraint of trade claims.

As addressed above, there was no error sufficient to warrant setting aside the jury's verdict.

IV. CONCLUSION

Defendant has failed to demonstrate any error in the instructions given to the jury. Further, Defendant has failed to establish there was insufficient evidence to support the jury's verdict. For the foregoing reasons, Defendant's Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial is DENIED.

IT IS SO ORDERED this 31st day of January, 2001.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 01-6067 and 01-6138

TELECOR COMMUNICATIONS, INC., an Oklahoma corporation; ADVANCED COMMUNICATIONS, INC., an Oklahoma corporation; COINLINK LLC, an Oklahoma Limited Liability Company; JACK KEELER, d/b/a Americall; KENNETH MERITT, d/b/a Oklahoma Heartland Payphone Services; DON OWENS, d/b/a Owens Communications Company; PAYPHONE PLUS LLC, an Oklahoma limited liability company; REDLANDS COMMUNICATIONS, INC., an Oklahoma corporation; and SOONER TELECOMMUNICATIONS, INC., an Oklahoma corporation;

Plaintiffs - Appellees,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, a Missouri corporation,

Defendant - Appellant.

ORDER
Filed November 12, 2002

Before **EBEL** and **KELLY**, Circuit Judges, and **WINDER***, District Judge.

Appellant's petition for rehearing is denied. Judge Kelly would grant rehearing.

* The Honorable David K. Winder, Senior District Judge, United States District Court for the District of Utah, sitting by designation.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. That petition is also denied. Judges Kelly and Hartz would grant rehearing en banc.

Judge Henry is recused.

Appellee's motion for appeal-related attorney fees is granted. This matter is remanded to the district court for determination of the amount of such fees.

Entered for the Court
PATRICK FISHER, Clerk of the Court
by: /s/ Diane K. Watkins
Diane K. Watkins
Counsel to the Clerk

APPENDIX G

UNITED STATES CODE ANNOTATED

TITLE 15. COMMERCE AND TRADE

CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

* * * *

§ 15(a). Suits by United States; amount of recovery; prejudgment interest

Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by it sustained and the cost of suit. The court may award under this section, pursuant to a motion by the United States promptly made, simple interest on actual damages for the period beginning on the date of service of the pleading of the United States setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In

determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether the United States or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;

(2) whether, in the course of the action involved, the United States or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings;

(3) whether the United States or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof; and

(4) whether the award of such interest is necessary to compensate the United States adequately for the injury sustained by the United States.

* * * *

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an

injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
PART III—SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

§ 276. Provision of payphone service

* * * *

(b) Regulations

(1) Contents of regulations

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that—

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A);

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a) of this section, which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry- III (CC Docket No. 90-623) proceeding;

(D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

* * * *

(3) Existing contracts

Nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of February 8, 1996.

* * * *

CONSTITUTION OF THE STATE OF OKLAHOMA ANNOTATED
ARTICLE IX.—CORPORATIONS
CORPORATION COMMISSION

* * * *

§ 18. Powers and duties—Notice before taking action—Process for witnesses—Authority of Legislature--Municipal powers

The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right, at all times, to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements, under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are

operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules, and regulations as may be necessary to prevent unjust or unreasonable discrimination and extortion by any transportation or transmission company in favor of, or against any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation, transmission, or otherwise, in connection with the public duties of such company. Before the Commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation, or requirement, shall first be given, by the Commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before said Commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or requirement shall first be published one time in substance in one or more of the newspapers of general circulation published in the county in which the Capitol of this State may be located, together with the notice of the time and place, when and where the Commission will hear any objections which may be urged by any person interested, against the proposed general order, rule, regulation, or requirement; and every such general order, rule, regulation, or requirement, made by the Commission, shall be published at length, in the next annual report of the Commission. The authority of the Commission (subject to review on appeal as

hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the Legislature to legislate thereon by general laws: Provided, However, That nothing in this section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town, or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the Commission, as far as possible, to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons or employees.

§ 19. Powers of court of record—Additional powers—Failure or refusal to obey orders

In all matters pertaining to the public visitation, regulation, or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and by enforcing its own appropriate process, against the delinquent or offending party or company (after it shall have been first duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as

well against the validity, justness, or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The Commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the Commission, within reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the Commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the Commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed or authorized by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the Commission, shall be a separate offense: Provided, That should the operation of such order or requirement be suspended, pending any appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties.

§ 20. Appeals to Supreme Court—Other courts to have no jurisdiction— Mandamus and prohibition

From any action of the Corporation Commission prescribing rates, charges, services, practices, rules or regulations of any public utility or public service corporation, or any individual, person, firm, corporation, receiver or trustee

engaged in the public utility business, an appeal may be taken by any party affected, or by any person deeming himself aggrieved by any such action, or by the State, directly to the Supreme Court of the State of Oklahoma, in the manner and in the same time in which appeals may be taken to the Supreme Court from the District Courts, except that such an appeal shall be of right, and the Supreme Court may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the public utility or public service corporation affected by any such action, the State of Oklahoma shall be made the appellee, but in other appeals hereunder, the public utility or public service corporation affected shall be made the appellee.

An appeal from an order of the Corporation Commission affecting the rates, charges, services, practices, rules or regulations of public utilities, or public service corporations, shall be to the Supreme Court only, and in all appeals to which the State is a party it shall be represented by the Attorney for the Corporation Commission, and the Attorney General, or his duly authorized representative.

The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States of the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence. Upon review, the Supreme Court shall enter judgment, either affirming or reversing the order of the Commission appealed from.

No court of this State, except the Supreme Court, shall have jurisdiction to review, affirm, reverse, or remand any action of the Corporation Commission with respect to the rates, charges, services, practices, rules or regulations of public utilities, or of public service corporations, or to suspend or delay the execution or operation thereof, or to enjoin, reverse, or interfere with the Corporation Commission in the performance of its official duties; provided, however, that writs of mandamus or prohibition shall lie from the Supreme Court to the Corporation Commission in all cases where such writs respectively would lie to any inferior court or officer.

§ 21. Supersedeas—Security—Accounts—Refunds—Precedence of appeals

Upon the giving of notice of appeal from an order of the Corporation Commission, the Commission, if requested, shall suspend the effectiveness of the order complained of until the final disposition of the order appealed, and fix the amount of suspending or supersedeas bond. Such suspending or supersedeas bond shall be approved and filed with the Corporation Commission (or approved, on review, by the Supreme Court), and made payable to the State of Oklahoma; provided, however, that in all cases involving orders of the Corporation Commission affecting rates or charges, the suspending or supersedeas bond must be sufficient in amount and security to insure the prompt refunding, by the appealing party, to the parties entitled thereto, of all rates or charges which such appealing party may collect or receive, pending the appeal, in excess of those authorized by the order appealed from, in event such order is, by such court, affirmed on appeal. The Corporation Commission, upon the execution of such suspending or supersedeas bond, shall forthwith require the appealing party, under penalty of immediate enforcement (pending the appeal and notwithstanding any supersedeas), of the order appealed from, to keep such accounts, and make to

the Corporation Commission, from time to time, such reports, verified by oath, as may, in the judgment of the Corporation Commission, suffice to show the amounts being charged or received by the appealing party, pending the appeal, in excess of the charge allowed by the order or action of the Corporation Commission appealed from, together with the names and addresses of the persons to whom such overcharges may be refundable, in case such charges made by the appealing party, pending the appeal, be not sustained on such appeal; and the Corporation Commission shall also, from time to time, require such appealing party, under like penalty, to give additional security, or to increase such suspending bond, whenever, in the opinion of the Corporation Commission, the same may be necessary to secure the prompt refunding of the overcharges aforesaid. Upon the final decision of the appeal, all amounts which the appealing party may have collected, pending the appeal, in excess of that authorized by such final decision, shall be promptly refunded by the appealing party to the parties entitled thereto, in such manner and through such method of distribution, as may be prescribed by the Corporation Commission, or by law. All such appeals, affecting the rates, charges, practices, rules or regulations of any public utility, or of any public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, shall have precedence upon the docket of the Supreme Court, irrespective of its place of session, next after habeas corpus cases, to the end that a plain, speedy and efficient remedy may be afforded the parties to such appeals.

§ 22. Statement of reasons for action—Cause heard on record—Certification of facts and evidence—New or additional evidence

The Corporation Commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the

action appealed from was based, and such statement shall be read and considered by the Supreme Court, upon disposing of the appeal. In no case of appeal from an order of the Corporation Commission shall any new or additional evidence be introduced in the Supreme Court, but the cause shall be heard on the record made before the Corporation Commission, and the Chairman of the Commission, under the seal of the Commission, shall certify to the Supreme Court all the facts upon which the action appealed from was based, and which may be essential for the prompt decision of the appeal, together with all evidence introduced before said Corporation Commission, as may be selected, specified or required to be certified, by any party in interest, as well as such other evidence, so introduced before the Commission as the Chairman may deem proper to certify; provided, however, that in any appeal from an order of the Corporation Commission in which a party thereto asserts the violation of any right under the Constitution of the United States or the Constitution of the State of Oklahoma, the Supreme Court shall require the Commission to take and receive such additional evidence as is necessary to judicially determine the rights of the parties and report the same to the Court, in such manner as the Court may prescribe, for its consideration before the appeal is finally decided.

* * * *

§ 24. Rights of action not affected—Questioning action of commission

The right of any person, firm, corporation, receiver or trustee to institute and prosecute in the ordinary courts of justice, any action, suit or motion against any public utility, or public service corporation, or any individual, person, firm, corporation, receiver or trustee, engaged in the public utility business, shall not be extinguished or impaired by reason of any

fine or other penalty which the Corporation Commission may impose or be authorized to impose upon such public utility, public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, because of its breach of any public duty or because of its failure to comply with any order or requirement of the Corporation Commission; but in no such proceeding by any person, firm, corporation, receiver or trustee, against such public utility, public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, nor in any collateral proceeding, shall the reasonableness, justness, or validity of any rate, charge, service, practice, rule, regulation or requirement, theretofore prescribed by the Corporation Commission, within the scope of its authority, and then in force, be questioned.

§ 25. Reports and recommendations

The Commission shall make annual reports to the Governor of its proceedings, in which reports it shall recommend, from time to time, such new or additional legislation in reference to its powers or duties, or the creation, supervision, regulation or control of corporations, or to the subject of taxation, as it may deem wise or expedient, or as may be required by law.

* * * *

§ 34. Definitions—Avoidance of conflicts with U.S. Constitution

As used in this Article, the term "transportation company" shall include any company, corporation, trustee, receiver or any other person owning, leasing or operating for hire a railroad, street railway, canal, steamboat line, and also any freight car company, car corporation, or company, trustee or persons in any way engaged in such business as a common carrier over a

route acquired in whole or in part under the right of eminent domain, or under any grant from the Government of the United States; the term "rate" shall be construed to mean rate of charge for any service rendered, or to be rendered; the terms "rate," "charge" and "regulation" shall include joint rates, joint charges and joint regulations, respectively; the term "transmission company" shall include any company, receiver or other person owning, leasing or operating for hire any telegraph or telephone line; the term "freight" shall be construed to mean any property transported or received for transportation by any transportation company. The term "public service corporation" shall include all transportation and transmission companies, all gas, electric, heat, light and power companies, and all persons, firms, corporations, receivers or trustees engaged in said businesses, and all persons, firms, corporations, receivers or trustees authorized to exercise the right of eminent domain or having a franchise to use or occupy any right of way, street, alley or public highway, whether along, over or under the same, in a manner not permitted to the general public, and all persons, firms, corporations, receivers and trustees engaged in any business which is a public utility or a public service corporation, at the present time or which may hereafter be declared to be a public utility or a public service corporation. The term "person" as used in this Article shall include individuals, partnerships, and corporations in the singular as well as plural number; the term "bond" shall mean all certificates or written evidence of indebtedness issued by any corporation and secured by mortgage or trust deed. The term "frank" shall mean any writing or token issued by or under authority of a transmission company, entitling the holder to any service from such company free of charge.

* * * *

OKLAHOMA STATUTES ANNOTATED

TITLE 17. CORPORATION COMMISSION
CHAPTER 6. TELECOMMUNICATIONS
TELEPHONE COMPANIES

§ 139.1. Coin-activated and credit card-activated telephones—Operating requirements

The Corporation Commission shall, by rule or order, promulgate and enforce operating requirements for coin-activated and credit card-activated telephones available for public use owned or operated by corporations or persons other than telephone corporations authorized by the Commission to operate within service areas. These requirements shall include, but are not limited to a requirement that every telephone permit a caller to be connected with the operator personnel of any telephone corporation authorized by the Commission to operate within a service area through the Commission authorized access method chosen by the operator service provider with exception of those coin operated or credit card-activated telephones made available to inmates at state, federal, local and county jails and correctional facilities.

TITLE 79. TRUSTS AND POOLS

CHAPTER 4. OKLAHOMA ANTITRUST REFORM ACT

§ 203. Trust in restraint of trade—Monopoly of trade—Refusal of access to essential facility—Actions by competitors

A. Every act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal.

B. It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce in a relevant market within this state.

C. Without limiting any other section of Title 79 of the Oklahoma Statutes or applicable sections of Title 17 of the Oklahoma Statutes, it is unlawful for any person in control of an essential facility to unreasonably refuse to give a competitor or customer of an entity controlling an essential facility access to it upon reasonable terms if the effect of such denial is to injure competition. An injured competitor or customer may bring an action under Section 5 of this act [FN1] to enforce the provisions of this section only when such injured competitor or customer does not have a remedy before the Corporation Commission.

D. As used in this section:

1. "Monopolize" means:

   a. the possession of monopoly power in the relevant market, and

   b. the willful acquisition or maintenance of that power by exclusionary conduct as distinguished from growth or development as a consequence of

a superior product and/or service, business acumen, or historic accident;

2. "Monopoly power" means the power to control market prices or exclude competition; and

3. "Essential facility" means a facility:

a. which is controlled by an entity that possesses monopoly power,

b. that a competitor would be unable to practically or reasonably duplicate,

c. the use of which has been unreasonably denied to a competitor or a customer of the entity that possesses monopoly power, and

d. that it would be feasible to allow the competitor or customer to use or have access to without causing harm to or unreasonably interfering with the entity that possesses monopoly power.

* * * *

§ 212. Interpretation of act consistent with federal law

The provisions of this act * * * shall be interpreted in a manner consistent with Federal Antitrust Law 15 U.S.C., Section 1 *et seq*. and the case law applicable thereto.

APPENDIX H

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF SOUTHWESTERN BELL TELEPHONE COMPANY FOR AN ORDER APPROVING PROPOSED CHANGES AND ADDITIONS IN APPLICANT'S GENERAL EXCHANGE AND LOCAL EXCHANGE TARIFF.	)	CAUSE NO. 29234
IN THE MATTER OF THE APPLICATION OF SOUTHWESTERN BELL TELEPHONE COMPANY FOR AN ORDER TO DISCONNECT THE TELEPHONE SERVICE TO MONOPOLIES, INC. IN TULSA, OKLAHOMA, AND TO THE CITY RESCUE MISSION, INC., IN OKLAHOMA CITY, OKLAHOMA, WHICH TERMINATE ON A CUSTOMER PROVIDED COIN INSTRUMENT.	)	CAUSE NO. 29085
	)	ORDER NO. 283149

ORDER

HEARINGS: October 9, 1984, January 22 and 23, 1985, before the Commission en banc.

HISTORY

On July 24, 1984, Southwestern Bell Telephone Company, hereinafter "Bell," filed an Application to disconnect the business local exchange telephone service to Monopolies, Inc., in Tulsa, Oklahoma, and to the City Rescue Mission, Inc., in Oklahoma City, both of which Bell alleged terminated on a customer provided coin instrument. Bell further sought an order from the Commission waiving compliance with Application, Notice and Hearing requirements of Rules 9 and 10 of the Rules and Regulations Governing the Operations of Telephone Companies and Telecommunications in Oklahoma, so that telephone service to any customers Bell found violating its tariff provisions through connection of customer provided coin telephone instruments could be promptly disconnected. Monopolies, Inc. responded to Bell's Application to disconnect telephone service on August 13, 1984. On October 2, 1984, this Commission issued its Notice and Order Setting the Cause for Hearing on October 9, 1984.

On October 5, 1984, Bell filed a verified Application in Cause No. 29234 seeking approval of proposed Private Coin Service tariffs for a new service to permit the provision of customer provided instrument implemented coin service pursuant to the rates, terms and conditions contained in the proposed tariffs. On the same date, Bell filed a Notice to Consolidate Cause No. 29234 with Cause No. 29085. The motion was subsequently granted.

On October 9, 1984, this Cause came on for hearing. The Commission was advised that, prior to the hearing, the telephone service which terminated on a customer provided coin instrument at the City Rescue Mission, Inc., in Oklahoma City, had been disconnected at the customer's request.

In support of its Application, Bell presented testimony that, according to Bell, Monopolies, Inc., in Tulsa, Oklahoma, had

a non-telephone company provided coin instrument directly connected to a flat rate business exchange line. The instrument was available for use for and being used by members of the Oklahoma public to place local calls in violation of Bell's Use of Service and Registration Tariffs.

Bell also presented testimony supporting its proposed Private Coin Service tariffs which, as filed, would permit the use of customer-provided coin instruments for local and intrastate calling under certain terms and conditions. Commission Staff suggested that, in light of the short amount of time for review, the rates and tariffs proposed by Bell could be authorized pending a final hearing in the Cause. Monopolies, Inc. chose not to call a witness and agreed to disconnect the customer provided coin instrument pending a final hearing in this Cause.

After careful consideration of the testimony and evidence presented, this Commission determined, in Order No. 267912, that a final hearing following notice was needed in the Cause. The Commission further ordered that the coin instrument at Monopolies, Inc. be disconnected pending the final hearing on the merits. The Commission further ordered that Bell's proposed tariffs should not be implemented on an interim basis, pending a determination of the threshold question of whether customer provided coin service was in the best interest of the Oklahoma public.

At the direction of this Commission, Bell caused to be published notice of the final hearing in this Cause set for January 22 and 23, 1985. Subsequent to the October 9th hearing, interventions were filed by 7-Eleven Stores, Quick Trip, General Telephone of the Southwest, Circle X, Oklahoma Restaurant Association, Universal Payphone Corporation, Oklahoma Retail Grocers Association, Capital Tel Systems, Inc., and a group of 13 independent telephone companies

within the State of Oklahoma. Pursuant to Order No. 267912, written direct testimony and comments were filed prior to the hearing by those parties wishing to present direct testimony and evidence in this Cause. On January 22, 1985, and continuing through January 23, 1985, this Cause came on for hearing.

POST-HEARING MOTIONS

1. On February 11, 1985, Bell filed a document entitled "Southwestern Bell Telephone Company's Offer of Proof" to which intervenors 7-11, Quik Trip and Universal Payphone Corporation filed objections.

Essentially Bell's "Offer of Proof" is an attempt to generally present rebuttal testimony of Mr. Fred Lowry and specifically what was marked for identification as Exhibit 35. Mr. Lowry was called as a rebuttal witness to address both the pre-filed testimony and direct and cross-examination of Dr. William Tucker, witness for 7-11 Stores. Exhibit 35 was prepared by Mr. Lowry and purported to show that Dr. Tucker's analysis "More likely than not underestimates the revenue losses to Bell under 7-11's proposed rate."

This exhibit was objected to by several intervenors on the grounds that Dr. Tucker's testimony had been pre-filed before the proceeding, pursuant to the Commission's order, and this exhibit should have been more properly submitted at an earlier date.

Upon examination by Vice-Chairman Eagleton, Bell admitted it had begun work on the exhibit approximately two weeks before but didn't finalize it until Dr. Tucker testified. It was Bell's position that Dr. Tucker may have changed his pre-filed testimony, upon which Bell made its calculations, at the hearing. The Commission then sustained the objections and did not receive Exhibit 35.

After reviewing the record in this Cause, Bell's Offer of Proof and the various objections thereto, we find that Exhibit 35 was properly excluded and further find that Bell's Offer of Proof be similarly excluded from consideration in this proceeding. This exhibit was first offered in the last hour of the last day of the hearing. Bell's reasoning seemed to be that the exhibit could not be finalized because Dr. Tucker might have changed his pre-filed testimony on the witness stand. It seems to us that this reasoning would better support the inclusion of an exhibit of this nature *had* Dr. Tucker substantially changed his testimony. Accordingly we are of the opinion that Exhibit 35 of Bell's Offer of Proof should be excluded.

2. On March 5, 1985 Bell filed its Motion to Reopen the Record to allow it to put on further testimony and evidence with respect to the claimed revenue shortfall under the rates proposed by 7-11. Again several parties filed in opposition to reopening the record.

The evidence Bell wishes to present, if the record were reopened, is the evidence discussed above that was ruled inadmissable by the Commission; both at the hearing and above in not accepting Bell's Offer of Proof. For the same reasons as set out above we decline to reopen the record for this purpose.

THE FCC DECISION

In its "Memorandum Opinion and Order", released June 25, 1984 the Federal Communications Commission (FCC), authorized the registration under Part 60 of its Rules, 47 C.F.R. Part 68, of instrument implemented coin telephone ("pay phones" or "coin Phones").

The FCC stated at page 11 of its Order:

> "A Part 68 registration grant constitutes a federal right to interconnect registered terminal equipment with the

public switched telephone, network, pursuant to any terms and conditions prescribed by Part 68."

The FCC tempered the above statement by saying that registration "does not necessarily affect state policies or regulations governing the resale of intrastate toll or local exchange service.

Finally the FCC cautioned that any state restriction affecting the use of coin phones that unreasonably infringes upon the right of customers to interconnect with the network in a way that is privately beneficial and not publicly detrimental can be reviewed by the FCC.

This Commission interprets the FCC order as stating that an instrument implemented coin telephone may be interconnected to the public switched network subject to state policies or regulations as long as those state policies or regulations do not unreasonably infringe a customers right to interconnect.

Further, the FCC has, by its Memorandum Opinion and Order, released May 6, 1985, reaffirmed its position that regulation of the terms and conditions under which intrastate pay telephone offering may be made to the public involve questions of an essentially local nature and should therefore be left to the state regulatory agencies.

SUMMARY OF EVIDENCE

Fred Lowery

Mr. Lowery, Staff Manager-Rate Administration testified on behalf of Southwestern Bell Telephone Company. Mr. Lowery presented testimony in support of Bell's proposal that the rates for private coin service be set at a level to recover the average revenues that Bell's coin telephones produce today in order to minimize the adverse impact to the Oklahoma

ratepayers. Mr. Lowry testified that Bell's proposed rates for private coin service were structured in two components. Those two components include a flat rate charge of $37.00 per month for the access line and a measured charge based on actual usage by the private coin service provider's customers. He testified that the proposed usage charge varied with the length of the call and whether the call was completed within the same central office or had to be switched to another central office. The rates proposed for Band A are applicable to those calls that are placed and completed within the same central office. The proposed charges for Band B are applicable to those calls that go between central office. In band A the proposed rate is a $0.03 charge for the initial minute and $0.01 for each additional minute. In Band B, the proposed rate is $0.04 charge for the initial minute and $0.02 for any additional minute.

Pending final implementation of a billing program in March, 1985, Bell proposed the application of a flat rate usage surrogate charge of $29.00 in lieu of the measured rates.

Mr. Lowry further testified that in developing his rate, he first looked at relevant costs of providing private coin service to make sure that any rates proposed would be above those relevant costs. He testified that he next looked at revenues Bell receives today which support the availability of Bell's coin service today. He testified that the average revenue that is currently recovered from coin services in Oklahoma today is approximately $62.00 per phone. The rate he proposed was designed to recover that average revenue.

Mr. Lowry also proposed certain notice and feature availability requirements for use with proposed private coin telephones which would help avoid customer confusion and certain operational expenses to Bell. These were as follows:

- A Private Coin Service customer's instrument must be registered or connected behind an F.C.C. registered coupler.
- The instruments must also be able to access the operator and 911 Emergency Service at no charge and without using a coin.
- The instrument must comply with all applicable regulations concerning the use of the telephone by disabled and/or hearing impaired persons.
- The customer of Private Coin Service would be required to prominently display notice in close proximity to the coin set that the customer provided instrument-implemented coin set is not a Southwestern Bell Telephone Company telephone; that detailed toll billing records showing the date and time of all calls, together with the called numbers, will be provided by Southwestern Bell Telephone Company to the Private Coin Service customer who should be identified by name in the notice; instructions explaining how the user of the private coin telephone can access the operator and 911 service, where available, at no charge and without using a coin; instructions explaining how to access Directory Assistance, how to place local and long distance calls, explaining one-way calling if the line is so arranged, and how to obtain refunds and make complaints.

Mr. Lowry further asserted that Bell Telephone Company's provision of its current coin services has been determined by public need, as well as by economic incentive but admitted that Bell had no written policy regarding factors to be considered in placing or removing a pay telephone and could not quantify the

criteria used by Bell in making a determination of when and where it places or removes a coin phone.

In responding to cross-examination that Bell's proposed rates were anti-competitive, Mr. Lowry stated that Bell had only sought to charge rates within the same structure as Bell incurred the costs of providing private coin service. He explained that Bell in no way attempted to tell the private coin providers how much, or in what manner, they should charge their customers for the use of their coin instruments. He testified that Bell currently incurred its own costs on usage sensitive basis but charged a flat rate per call based on average usage.

Lamar Horton

Mr. Lamar Horton, President of Telepay Systems, Inc., a distributorship of Tonka Coin Telephone, testified on behalf of Monopolies, Inc. Mr. Horton testified that the Tonka phone was registered by the F.C.C., could access 911 free of charge, could access directory assistance for a deposit of a quarter, and due to the fact it was controlled by a microcomputer, had the option of being programmed to either access the operator or deny access to the operator.

Mr. Horton testified that, in his opinion, Bell's proposed rate structure of measured service was discriminatory in that private coin operators could not charge $0.25 per call and make a profit. Further, Mr. Horton testified that Bell doesn't charge its users of Bell's coin services on a measured basis and that, in his opinion, private coin providers should not be forced to do so. Mr. Horton further testified that he felt measured service was inappropriate in that a private coin provider would have difficulty in auditing the rates it was charged by Bell.

Mr. Horton testified that he thought the tariff submitted by Monopolies, Inc. proposing a rate equivalent to the Oklahoma

City, business line rate and offering alternative conditions of service was appropriate. Mr. Horton testified that competition in the coin telephone market was to the benefit of the Oklahoma ratepayers. He further testified that Bell would benefit due to additional phones being placed on the network. This testimony was based on a personal survey conducted by Mr. Horton's business.

Mr. Horton testified that the call screening feature would be necessary if this Commission determined that access to the operator was a requisite feature for customer provided coin telephones.

William Tucker

Mr. William Tucker was called to testify on behalf of 7-Eleven Stores. Mr. Tucker proposed, in direct testimony, that the appropriate rate for private coin service should be a flat rate of $39.47 if private coin service was offered on a statewide basis. Mr. Tucker testified that he developed that rate based on the review of an embedded cost study of Bell's own central office implemented service. Mr. Tucker testified that he reviewed the accounts of capital investments and expenditures made by Bell for Bell's own coin service and deleted those accounts which he felt would be inappropriate or not necessary to the provision of private coin service by Bell. Mr. Tucker further testified that he had performed a revenue effect analysis which showed that, based on certain assumptions, the provision by Bell of private coin service at Mr. Tucker's proposed rate would result in greater percentage contribution over cost than the percentage of contribution over cost that Bell currently receives under its own coin services. Mr. Tucker testified that the assumptions he made were that for every ten PCS phones hooked up, nine of those phones would displace a Bell phone and one would be a new coin phone in service. He further testified that he assumed that those net new phones would

produce, on an individual phone basis, 50% of the current toll revenues produced by a Bell coin phone; since, in his opinion, there was not a linear relationship between the addition of a coin phone and the additional toll revenue produced. His further testimony was that, in his opinion, the 7-Eleven proposed rate was more appropriate in that it would not deter people from providing customer provided coin service, and that Bell would benefit by the net new phones which would be revenue gainers for Bell.

He further testified that he proposed a flat rate due to the fact that he considered measured usage charges extremely anti-competitive. It was his testimony that he felt that private coin providers could not face costs on a usage sensitive basis and not reflect that in the price that they charge. It was his further testimony that if Bell continues to offer unlimited calling at $0.25 per call as opposed to private coin service which, in his opinion, would have to use a measured rate, Bell would have a competitive advantage.

Mr. Tucker identified the positive features he felt private coin service offered to the public of Oklahoma, as follows:

1. Greater availability of coin phones to the public generally;

2. Generate substantial amount of contribution which would reduce the burden on the general body of ratepayers;

3. Since private coin providers would be implementing state of the art equipment, PCS phones could be used, not only for the provision of coin service, but for other technical needs of the business, for example, monitoring conditions of washing machines for repair needs by a laundromat and assisting in the

implementation of a burglar alarm service in a so-called "smart building."

It was Mr. Tucker's further testimony that, in his opinion, prior to entering the marketplace, a potential private coin provider would look at all his costs of doing business, not just the $39.47, but also charges by the telephone company for such services as touch-tone and interstate and user charges.

Mr. Tucker further testified that he advocated a cost based rate for private coin service because of the competitive nature of the service and the fact that it was not a monopoly service. In responding to questions from Commissioner Eagleton, Mr. Tucker agreed that costs savings to Bell would not occur simultaneous with the immediate revenue losses which would occur to Bell.

William C. Brown

Mr. William C. Brown, President of 7-Eleven Stores of the Greater Oklahoma City area, also testified on behalf of the 7-Eleven Stores. Mr. Brown testified that, in his opinion, Bell was inefficient in providing its own coin telephone services. He further testified that he could not quarrel with the service that had been provided by Bell on its coin services located at 7-Eleven Stores over the past years. It was his testimony that a measured rate would be unfair in that the private coin provider could not charge a flat rate. Further, he testified that private coin vendors would need to audit Bell's records in order to determine whether they were being charged the right amount of money. He further testified that, in his opinion, the system as it worked today was unfair in that 7-Eleven created the market and business which attracted a substantial amount of public which used Bell's coin phones, and that Bell in return took all the revenues from these phones.

Mr. Brown further testified that he was interested in a phone which provides different and better services, i.e. a more attractive piece of equipment than Bell, for the reason that "it becomes an important profit-making thing for us if we have the phone. Mr. Brown also testified on cross-examination that it was his original intent to propose to the Commission that Bell charge a straight business line rate for private coin service, but that since Mr. Tucker had proposed a higher rate, he would have to live with that. He further testified that he had not speculated beyond Mr. Tucker's rate as to whether he would be willing to connect private coin telephone.

David Jacobson

Mr. David Jacobson was called as a witness for the Staff. Mr. Jacobson summarized his testimony on the basis that he had reviewed the rates, terms and conditions that Bell had proposed for private coin service in terms of reasonableness. He further testified that he was not only interested in the rate to be charged, but in the revenue effect to the telephone company. He further testified that his primary concern was that the Oklahoma public continue to have full service coin telephones available on a statewide basis; that is, access to local and long distance services, as well as directory assistance, operator access and emergency service, the last three free of charge and without the use of a coin. It was his testimony that the same service provided today be continued on a statewide basis.

Mr. Jacobson further testified that the appropriate rate level and rate structure should be one that would be revenue neutral to Bell, in light of the changing industry and reduction of many of the revenue streams and sources to the telephone company over the past year. He proposed that for the reasons set out above the tariffs proposed by Bell be implemented on an interim basis, and the lack of information available on the impacts of private coin service to the telephone company. Mr.

Jacobson proposed that over the interim period, the Commission should gather information, including revenue losses, if any, to the telephone company from the displacement of public phones by private coin service, the number of private coin phones installed on a measured rate as well as the number of private coin phones installed on a flat rate, the number of semi-public phones replaced by private coin service providers, the number of public telephones Bell removes during that time, the revenue Bell receives from the usage rates that applies to private coin service, and also the revenue Bell receives from the flat rates it receives from private coin service, the actual usage on private coin phones in measured offices, costs saving that Bell might incur as a result of private coin service, and what locations generally private coin service develops in.

Mr. Jacobson testified that there was not true competition between Bell and the private coin provider in that Bell is obligated to keep coin telephones in sparsely populated areas where there is a public need, but not necessarily a lot of use. He testified further that if the profitable phones are picked from Bell, and Bell is still under a public service obligation and private coin vendors are not, that the revenue losses which Bell might incur would be picked up by the general body of ratepayers which, in his opinion, was not in the public interest of Oklahoma. In response to Commissioner Eagleton's concern that rates would be set such that investments would be made and then rates might possibly be changed, Mr. Jacobson testified that he too was concerned that if the Commission set rate levels to low, it would result in possible false signals to the marketplace. He testified further that such false signals would not only be expensive for those who invested in coin instruments, presuming the lower rates, but also for the telephone company who would have to remove the telephone originally and then, when the rates are increased, have the possible expense of placing other telephones in the same

location or letting the location go without public coin service. Mr. Jacobson therefore recommended that, instead of the Commission putting in a rate too low to begin with, that it would be more reasonable for this Commission to assume an average revenue producing phone and try to set a rate based on the average revenues currently received by the telephone company. He further testified that this Commission could then lower the rate if cost savings to Bell pan out as a number of pay phones enter the marketplace.

ISSUES

In Order No. 267912 we indicated that before any tariffs were approved, the threshold question of whether or not to allow any customer provided instrument-implemented coin telephone service in the State of Oklahoma needed to be addressed. After reviewing the record made in this Cause, we are of the opinion and so find that Southwestern Bell Telephone Company should be the sole supplier of coin telephone service within its service territory.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a thorough review of all the evidence and testimony presented in this Cause, we find as follows:

1. The Commission has the jurisdiction to hear this Cause by virtue of Article IX, Section 18 of the Oklahoma Constitution and Title 17, Sections 131 et. seq., of the Oklahoma Statutes.

2. As noted above we find that Bell should be the sole provider of coin telephone service within its service territory.

3. A regulated utility, such as Bell, provides a service that is necessary, widely used and for which good substitutes are not available. Additionally, the regulated utility cannot choose to serve some customers and not others, as long as the company

receives a reasonable price for its services. Nor can it discriminate unduly between customers. In an unregulated industry, a customer may be turned away for reasons of low or nonprofitability, whereas that same customer would be given an opportunity to receive service in a regulated environment. In this case, new business entities appear willing to provide similar service but there is no guarantee of price or service in low or nonprofitable areas.

4. The issue of competition versus regulation is probably the major issue facing the telecommunication industry today. We find that the provision of private coin service will result in unfair, unequal competition to the detriment of Bell's local exchange customers. We feel this is so due to the fact that as high profit coin phone areas are shifted from Bell to the new business entities, Bell will lose those revenues which historically have helped subsidize Bell's low or no profit locations. The nonprofitable coin phones served by Bell may require subsidization to the extent not offset by the various proposed tariffs or the effects of the competitive market. If, in fact, subsidization becomes necessary Bell would be in a position of asking this Commission for higher rates from its local exchange customers to cover these costs or simply removing its low or no profit coin phones to the detriment of all customers. The result could be higher rates for everyone to cover the cost of this competition, a reduction in the number of coin telephones available for public use or both. We do not feel this was the intent of the FCC in its orders noted above. We do not believe Bell's ratepayers should bear this risk.

5. The goal of universal service has been endorsed for many years as displayed in 1949 when Congress passed and President Truman promptly signed the Rural Telephone Bill, which authorized a program for 35 year, 2% loans for improvement and expansion of rural telephone service. In 1973, the National Association of Regulatory Utility Commissioners

adopted a resolution with the ultimate objective, "A telephone in every home".

In today's post divestiture environment, maintaining universal service has become a monumental task. This Commission has pledged in the past and will strive in the future to accomplish such an important goal. In order to succeed, we must adhere to the strategy of protecting the current revenue streams of the utility, which protects the ultimate consumer. In this view we find that the provision of private coin service cannot be accomplished in a way which is not publicly detrimental to Southwestern Bell's local exchange ratepayers.

ORDER

IT IS THEREFORE ORDERED that the application in Cause No. 29234 be and is hereby denied.

IT IS FURTHER ORDERED that Southwestern Bell Telephone Company be and is hereby the only authorized provider of coin phone service within its territory.

IT IS FURTHER ORDERED that Southwestern Bell Telephone Company be and is hereby authorized to disconnect the entities set forth in Cause No. 29084 in accordance with the applicable rules of this Commission.

CORPORATION COMMISSION OF OKLAHOMA

/s/ James B. Townsend
JAMES B. TOWNSEND, Chairman

Dissenting Opinion
NORMA EAGLETON, Vice-Chairman

/s/ Harry Baker
HARRY BAKER, Commissioner

DONE AND PERFORMED this 2nd day of August, 1985.
BY ORDER OF THE COMMISSION:

/s/ Berdee S. Holt
BERDEE S. HOLT, Secretary

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF SOUTHWESTERN BELL TELEPHONE COMPANY FOR AN ORDER APPROVING PROPOSED CHANGES AND ADDITIONS IN APPLICANT'S GENERAL EXCHANGE AND LOCAL EXCHANGE TARIFF.	)	CAUSE NO. 29234
IN THE MATTER OF THE APPLICATION OF SOUTHWESTERN BELL TELEPHONE COMPANY FOR AN ORDER TO DISCONNECT THE TELEPHONE SERVICE TO MONOPOLIES, INC. IN TULSA, OKLAHOMA, AND TO THE CITY RESCUE MISSION, INC., IN OKLAHOMA CITY, OKLAHOMA, WHICH TERMINATE ON A CUSTOMER PROVIDED COIN INSTRUMENT.	)	CAUSE NO. 29085

DISSENTING OPINION
(FILED AUGUST 2, 1985)

EAGLETON, N., Dissenting.

The majority today grants relief that no party in this proceeding requested, relief for which there was no evidence

during the three days of hearing, relief in fact which the evidence shows to be contrary to the interests of the parties in the cause and to the ratepayers of Southwestern Bell Telephone Company.

In rejecting Bell's application to establish a tariff for privately owned coin-operated telephones; the majority remarkably has endorsed the current scheme which has arbitrarily limited the number of coin telephones available in our state and which has cost Oklahoma ratepayers millions of dollars a year in subsidies.

The majority recites several broad statements about the obligations of this Commission under the law and our responsibilities to the telephone consumers of this state. Absent from that recitation, however, is the Commission's well-founded obligation to make decisions based on the sworn evidence before it.

The requirement that this Commission confine its consideration to the official record is no vain and idle gesture. The rigors of examination and cross-examination in a public hearing serve to illuminate the issues, to test and refine the options. It is no accident that the majority in departing from the record has drifted into confusion. It is likewise no accident that today's decision serves neither the public interest nor the lofty goals articulated by the majority.

The majority announces that the monopoly coin telephone system it has chosen to perpetuate is a "necessary and widely used" service in which Bell does not "unduly discriminate...(nor) choose to serve some customers and not others...(because of) non-profitability." (Order, page 13.) The evidence discloses Southwestern Bell has no formal criteria for the placement or contract conditions of public coin telephones.[1] Some customer requests for coin telephones are honored, others are not. Some customers receive a share of the revenues from

the telephones on their premises, others do not.[2] But Bell's witness testified that while no consistent set of policies is used in deciding which customers will be awarded public coin telephones and which will not, the one factor that is consistently considered is the profitability of the location.[3]

The majority announces there is "(no) good substitute...available" for the current system (Order, page 13). The testimony speaks clearly to the contrary. This issue is before us today precisely because of the technological and economic advantages offered by the new "smart" coin telephone sets in the competitive marketplace: advantages of customer choice and flexibility, advantages of expanding the network of coin telephones, and advantages of efficiency mandated by the marketplace.[4] Bell's own witness and those of the other parties disclosed evidence of the inefficiencies and costs to the ratepayers of the current system,[5] and of the cost savings to Bell that would result in a competitive environment.[6] Bell and others also provided a range of steps that could be taken to minimize any negative side effects which might occur from the transition from the monopoly to the free market.

The majority announces that introduction of privately owned coin telephones and competition in Oklahoma would result in "unfair competition...(because) as high profit coin telephone areas are shifted from Bell to the new business entities, Bell will lose those revenues which historically have helped subsidize Bell's low or no profit locations." (Order, page 13.) The evidence is to the contrary. Experience in other states and the testimony in this case indicates that the number of coin telephones actually would increase by as much as 50 percent in a competitive environment, and that many of the new installations would be in locations not served by Bell or where Bell is losing money.[7] Additionally, there is nothing in the record to indicate that the "low or no profit locations" which Bell serves are necessary or of any real public benefit. The

evidence is, in fact, that 10 of the 20 lowest-paying coin telephones on Bell's system are in private businesses; one is in a private club, three on the premises of fraternal organizations.[8] There may be a good reason why the members of those clubs and fraternities want a coin-operated telephone. I am not persuaded, however, that non-member ratepayers should be required to pay up to $868 a year per phone[9] for the convenience of those organizations' members and guests.

The majority announces that "subsidization" of those low-paying telephones would be necessary, and if so, "Bell would be in a position of asking this Commission for higher rates from its local exchange customers to cover these costs." (Order, page 13.) The evidence belies the majority's concern. Bell ratepayers already pay some $2 1/2 million a year in addition to coin box revenues to subsidize the company's non-profitable coin telephones, with no assurance that the subsidized phones serve a public benefit.[10] Conversely, with competition and a properly designed tariff, the number of coin telephones can be expected to increase significantly, thus reducing or possibly eliminating the need for ratepayer supported subsidies.

The majority concludes "that Southwestern Bell should be the sole supplier of coin telephone service within its service territory." (Order, page 13.) The record in this case demands the opposite conclusion. The record demands that the Commission allow competition into the coin-operated telephone market in Oklahoma under rational tariffs.

Many of the concerns which trouble the majority can be alleviated by establishing appropriate tariffs for connection to the Bell network. The tariffs must insure that only registered instruments are connected so that the network is not harmed. They must provide for adequate customer information and some minimum level of service. The tariffs must allow Bell to recover its costs of connecting private coin telephones to the

network, and the tariff must make a reasonable contribution to the basic telephone network from which all customers benefit. The tariff must, in the words of one witness, protect Bell and its customers from unrecovered costs and higher rates and "provide an opportunity for entrepreneurs to enter the marketplace."[11]

The record in this case provides clear direction for an appropriate tariff. All of the parties endorsed the recommendation of the Commission Staff for access to operator and to emergency services, for customer information and technical standards.[12] This Commission should adopt those recommendations.

All of the parties – including Bell, the equipment providers, the state's retail grocers and the staff – indicated they could support a two-part tariff which met the revenue needs described above.

One element, a fixed monthly charge, must recover the costs to the company of the access line and connections to the customer's privately owned instrument. Several parties made specific recommendations on the appropriate factors to consider in designing such a charge. A review of those recommendations and of the company's general tariffs and rate structure suggests that the single line business rate would be a sound choice. That rate allows Bell to recover its costs of providing the line and includes a contribution to support the basic telephone network.

All of the parties indicated they could support an additional charge which would track usage. Bell proposed a measured charge based on minutes of use. Although minutes of use is a fundamental measurement in the industry and employed in assessing charges for an increasing variety of telecommunications services, it is not currently used in Oklahoma in any of the local exchange services. A charge

based on the number of calls made from each phone appears more appropriate as it is precisely the manner in which Bell itself charges its own coin telephone customers for local calls.

A per-call charge of 5 cents to 7 cents would recover for Bell any traffic-sensitive costs the company may incur in providing access to the private coin telephones. The charge also would directly address any legitimate fears about "cream-skimming." The relatively low fixed charge would encourage privately owned telephones to be installed in less-than-high-profit areas. The second element based on usage would ensure that providers and/or owners in high-revenue locations would provide additional revenues for support of any legitimately public service telephones for which no other source of support is available.

A two-tiered tariff with a relatively low basic charge and a surcharge based on usage would provide benefits to Bell, to the owners of coin-telephones, and to all Bell's customers. Bell would recover its fixed and variable costs. The tariff would provide incentives to those who wish to connect their own coin instruments to the network, thereby expanding the network of telephones and reducing the need for subsidies. The tariff's built-in contribution to the basic network would benefit all Bell's customers and would support the goal of universal service.

The majority correctly concludes that the issues of competition and regulation are the major ones facing the telecommunications industry today; they properly cite the Federal Communications Commission for its role. But the FCC is less the initiator of those issues than a responder to them. Deregulation of the telephone industry did not cause competition and regulation to conflict, but was the Federal government's response to the struggle.

The competitive forces which have presented themselves in this case and others are driven by technology and economics. Our traditional pricing and subsidy schemes have been called into question.

The challenge today is to redefine the proper role for regulation in maintaining universal telephone service.

Regulation fundamentally serves as a proxy for competition. Industries which provide an essential service must be regulated when competition cannot or will not provide that service fairly and efficiently. The record in this case clearly demonstrates competition not only can and will provide an effective and efficient substitute for the regulated monopoly coin-telephone service, but is ready at this moment to do just that.

It is ironic that the majority recalls President Truman's signing the Rural Telephone Act of 1949. The significance of that event was that Harry Truman did not fear change. The significance for us today is that competition has come to the telecommunications industry, and our challenge is to make that change work to the benefit of Oklahoma consumers.

The majority's decision to protect Bell's monopoly control over coin-operated telephones within its territory is contrary to the evidence in this case. It is contrary to the trend in this nation.[13] It tells the consumers of this state that the benefits of the economic and technological revolution occurring in telecommunications will go to others while they are left to the tender mercies of the monopoly provider.

I must dissent.

/s/ Norma Eagleton
NORMA EAGLETON, Vice Chairman

NOTES

1. Bell Counsel Michael Bauer, transcript, page 64.
2. Witness Fred W. Lowry, transcript, pages 37-46; Witness Lamar Horton, Transcript, page 125; Witness William C. Brown, transcript, page 298.
3. Lowry, Transcript, page 39.
4. Horton, Transcript, pages 134-5, 161, 171; Witness William C. Tucker, Transcript, page 213.
5. Lowry, generally; Tucker, Transcript, pages 276-7; Brown, Transcript, pages 295-305.
6. Lowry, Transcript, pages 57-62.
7. Lowry, Transcript, pages 83-4; Horton, Exhibit No. 21, page 5, and Transcript, pages 123-4; Tucker, Exhibit No. 23, pages 7-8, and Transcript, pages 268-70.
8. Lowry, Exhibit No. 22, pages 7-8.
9. Witness Lowry testified that the average daily revenue from the phones in question is 1.3 cents ($0.013), or $4.75 a year. (Transcript, pages 7-8). The phones cost Bell $72.70 a month, or $872.40 per year, according to Bell's public coin phone cost study. The net of revenues and cost means other ratepayers are paying some $868 a year in subsidies to each phone.
10. Witness Lowry testified that the average monthly local revenue per phone from all of Bell's coin stations is $62, which calculates to an annual total of approximately $13.9 million. As noted above, Bell's cost study puts the average monthly cost per station at $72.70, or $16.3 million per year.
11. Lowry, Transcript, page 69.

12. Witness J. David Jacobson, Exhibit No. 24, page 7-8.

13. A review of the Commission orders and the literature indicates that 22 states have allowed some form of competition in coin phones since the issue arose in the last two years. One state has definitively disallowed it. Consideration is pending in the remaining 27 states, including several that initially declined to open the market but now are reconsidering it. Included among the 22 states where competition is allowed are the two (Missouri and Texas) Southwestern Bell-served states that have acted on the issue prior to the Commission's decision today. For examples see: Missouri Public Service Commission Docket No. 2C-84-233; Texas Public Utility Commission Docket No. 5905; Minnesota Public Utilities Commission Docket No. P421/C-82-4645 and Iowa Commerce Commission Docket No. INU-85-3 and RMU-85-6.

APPENDIX I

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

IN THE MATTER OF A RULEMAKING OF THE OKLAHOMA CORPORATION COMMISSION TO ESTABLISH RULES AND REGULATIONS CONCERNING PAY TELEPHONES.	)	CAUSE NO. RM 960000013

FILED APR 03 1996
COURT CLERK'S OFFICE-OKC
CORPORATION COMMISSION OF OKLAHOMA

NOTICE OF PROPOSED EMERGENCY AND PERMANENT RULEMAKING

In August, 1995, the Oklahoma Corporation Commission ("Commission") initiated a rulemaking in Cause No. RM 950000019 with the intention of creating rules that would promote a highly competitive market for local exchange telecommunications services. The Commission successfully completed its initial efforts toward accomplishing that goal by submitting rules concerning local exchange telephone competition to the Governor of the State of Oklahoma, the President Pro Tempore of the Senate, and the Speaker of the House of Representatives on March 18, 1996.

This new rulemaking is being initiated by the Commission as an additional step in furtherance of its goal, with further intentions of promoting competition among payphone service

providers and the widespread deployment of payphone services to the benefit of the general public, consistent with the intent of the Telecommunications Act of 1996.

The Commission proposes to establish rules regarding but not limited to: what are pay telephones; what constitutes payphone services; what is a reasonable compensation rate which will ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call utilizing payphones; should emergency calls and telecommunications relay services calls for hearing disabled individuals be subject to payment under a compensation plan; whether public interest payphones, which are provided in the interest of public health, safety, and welfare in locations where there would otherwise not be a payphone, should be maintained, and if so, how to ensure that such public-interest payphones are supported fairly and equitably; what safeguards are necessary to protect the interest of competitive payphone service providers; what safeguards are necessary to protect the end-users; what possible changes to Oklahoma Administrative Code ("OAC") 165:55 may be necessary; and, any other issues which may arise during this rulemaking process that the parties believe, or that the Commission determines, should be included. The Commission is aware that it may also be necessary to amend and/or promulgate rules in OAC 165:5, the Commission's Rules of Practice, in order to facilitate the processing of tariffs and applications for authority to compete for payphone locations and services in the telecommunications industry. Accordingly, the Commission hereby gives notice that it may amend and/or promulgate rules in OAC 165:5 as part of this rulemaking docket. The Commission therefore proposes this Notice of Proposed Emergency and Permanent Rulemaking to allow all interested persons the opportunity to provide proposed rules, comments, and/or recommendations and to the

Commission for consideration in drafting rules and regulations pertaining to payphones and payphone services.

NOTICE IS HEREBY GIVEN that the Commission proposes to establish rules regarding payphones and payphone services that will be promulgated in the Oklahoma Corporation Commission Rules and Regulations codified in the OAC. This action is initiated under the Oklahoma Administrative Procedures Act, 75 O.S. (1991) Section 250 et seq., and 17 O.S. (1991) Section 131 et seq., and Article IX, Section 18 of the Oklahoma Constitution.

ISSUES PROPOSED FOR COMMENTS, RECOMMENDATIONS AND OR RULES

1. Please define "payphone services".
2. What certification procedures are necessary to ensure the integrity and capability of each provider?
3. What should be the appropriate minimum operating standards for equipment and service?
4. What safeguards are necessary to protect the interests of the end-users?
5. What safeguards are necessary to protect the interests of competing pay telephone providers and the facility-based provider?
6. Should there be objective standards that determine where pay telephones should be located?
7. Should Incumbent Local Exchange Carriers maintain their Carrier of Last Resort obligations with regard to pay telephones?
8. Should competitive pay telephone providers contribute to the Universal Service Fund, and if so, how should the level of contribution be determined?

9. How should enforcement of operating requirements and service quality standards be established?

10. What information (e.g. ownership, trouble reporting numbers, local carrier information, etc.) should be identified on the equipment of the pay telephone provider for the benefit of the end-user?

11. Should the Commission have the final say in determining a competitive pay telephone provider's service territory?

12. Should guidelines be established regarding the process of setting rates?

13. How should directory assistance be handled, and why is the procedure recommended?

14. Should competitive pay telephone providers be required to provide free access to emergency services?

15. Will Competitive Local Exchange Carriers be required or allowed to purchase bundled or unbundled network elements?

16. Will interconnections be the same as those contemplated in the local competition rules approved in RM 950000019?

17. Who should be responsible for the testing of lines and equipment in the event of trouble reports?

18. What is the appropriate turn-around time for repairs?

19. What impact does the Telecommunications Act of 1996 have on payphones and payphone services?

20. Are there any revisions necessary to any of the Commission's current rules, and if so, what?

21. Are there any other issues, which may impact or be impacted by this rulemaking, that the Commission should consider and/or include in this rulemaking?

NOTICE IS FURTHER GIVEN that any interested person may obtain copies of this Notice of Proposed Emergency and Permanent Rulemaking, free of cost, during regular business hours (8:00 a.m. to 4:30 p.m.) At the Corporation Commission's Court Clerk's Office, First floor, Jim Thorpe Building, 2101 North Lincoln Boulevard, Oklahoma City, Oklahoma.

NOTICE IS FURTHER GIVEN that a Rule Impact Statement will be available for public inspection in the Commission Court Clerk's Office, first floor, Jim Thorpe Office Building, 2101 North Lincoln Boulevard, Oklahoma City, Oklahoma, within 15 days of publication of this Notice of Proposed Emergency and Permanent Rulemaking.

NOTICE IS FURTHER GIVEN that any interested person wishing to file proposed rules and/or comments regarding the above listed topics, may do so by filing the original and eight (8) copies of the same, on 8-1/2 x 11 inch paper, in the Commission Court Clerk's Office, P.O. Box 52000-2000, Oklahoma City, Oklahoma 73152-2000, by the close of business on April 24, 1996, with two (2) copies submitted to Cece L. Wood, Assistant General Counsel, Oklahoma Corporation Commission, Room 400, Jim Thorpe Building, 2101 North Lincoln Boulevard, Oklahoma City, Oklahoma 73105, Telephone: (405) 521-2308. Proposed rules and/or comments should identify, by number, the question(s) in the Notice of Proposed Rulemaking to which they are responsive.

NOTICE IS FURTHER GIVEN that Technical Conferences shall be held in Court Room 301, or as otherwise posted, Jim Thorpe Building, 2101 North Lincoln Boulevard, Oklahoma City, Oklahoma at 10:00 a.m. on May 1, 1996, May 29, 1996, and as otherwise may be necessary.

NOTICE IS FURTHER GIVEN that the Commission Staff shall make written proposed rules available on May 22, 1996,

and any Reply Comments the interested parties may wish to make to the Staff's proposed rules should be in writing and filed in the Commission Court Clerk's Office, P.O. Box 52000-2000, Oklahoma City, Oklahoma 73152-2000, by the close of business on June 5, 1996, consistent with the procedures as outlined above.

NOTICE IS FURTHER GIVEN that rules adopted pursuant to this notice shall be submitted to the Governor of Oklahoma for emergency approval pursuant to 75 O.S. § 253, as well as submitted to the Governor and Legislature for permanent approval.

NOTICE IS FURTHER GIVEN that this Cause shall be heard before the Commission *en banc* on June 14, 1996, at 10:00 a.m. in Court Room 301, in the Jim Thorpe Building, 2101 North Lincoln Boulevard, Oklahoma City, Oklahoma.

NOTICE IS FURTHER GIVEN that in case of questions, please contact Cece L. Wood, Assistant General Counsel, Oklahoma Corporation Commission, Room 400, Jim Thorpe Building, P.O. Box 52000-2000, Oklahoma City, Oklahoma 73152-2000, phone (405) 521-2308.

CORPORATION COMMISSION
OF OKLAHOMA

/s/ Cody L. Graves
Cody L. Graves, Chairman

/s/ Bob Anthony
Bob Anthony, Vice-Chairman

/s/ Ed Apple
Ed Apple, Commissioner

DONE AND PERFORMED this 3rd day of April, 1996. BY ORDER OF THE COMMISSION:

/s/ Charlotte W. Flanagan
Charlotte W. Flanagan
Commission Secretary

APPENDIX J

Corporation Commission
PO Box 52000-2000 FAX (405) 521-4983
Phone (405) 521-3596

OKLAHOMA CITY, OKLAHOMA 73125-2000

Filed: August 20, 1996
Court Clerk's Office - OKC
Corporation Commission of Oklahoma

August 19, 1996

The Honorable Frank Keating Governor of the State of Oklahoma Suite 212, State Capitol Building Oklahoma City, Oklahoma 73105	Received August 19, 1996 OFFICE OF THE GOVERNOR
The Honorable Stratton Taylor President Pro Tempore - Senate Suite 442, State Capitol Building Oklahoma City, Oklahoma 73105	Received August 19, 1996 PRESIDENT PRO TEMPORE
The Honorable Glen D. Johnson Speaker of the House of Representatives Suite 401, State Capitol Building Oklahoma City, Oklahoma 73105	Received August 19, 1996 Speaker of the House of Representatives
Oklahoma Advisory Committee Intergovernmental Relations Room 307, State Capitol Building Oklahoma City, Oklahoma 73105	Received August 19, 1996 ACIR

Re: Oklahoma Corporation Commission
Agency Rule Report
Payphone Telephone
OAC 165:58
RM 960000013

Gentlemen:

Attached hereto are your copies of the Oklahoma Corporation Commission's Agency Rule Report establishing the Pay Telephone Service Rules. Should you have any questions, please call on me. My telephone number is 522-4456.

Sincerely yours,

/s/ Nancy Kelly
Nancy Kelly
Agency Liaison

Attachments

ATTESTATION

I, the undersigned, do hereby attest that the copy enclosed herewith is a true and correct copy of new Chapter 58, Facilitation and Provisioning of Payphone Service Rules, which were finally adopted by the Oklahoma Corporation Commission on July 15, 1996, under the emergency and permanent rulemaking provisions of the Administrative Procedures Act, 75 O.S. Sections 250 et seq.

I, the undersigned, do hereby attest that such rules were finally adopted in substantial compliance with the Administrative Procedures Act.

/s/ Rachel Lawrence-Mor
Rachel Lawrence-Mor
Deputy General Counsel
August 19, 1996

I, Peggy Mitchell, Secretary of the Corporation Commission of the State of Oklahoma, do hereby certify that this is a true and correct copy of the original on file in this Commission.

In witness whereof, I hereunto set my hand and affix the seal of the Corporation Commission of the State of Oklahoma. Done in this office of the Commission this 28th day of June, 2001.

CORPORATION COMMISSION OF OKLAHOMA

PEGGY MITCHELL, Secretary

By: /s/ Peggy Mitchell

AGENCY RULE REPORT
OKLAHOMA CORPORATION COMMISSION
EMERGENCY AND PERMANENT RULEMAKING
TO ESTABLISH RULES AND
REGULATIONS CONCERNING PAY TELEPHONES
OAC 165:58

RM 960000013

Pursuant to 75 O.S. 1991, Sections 303.1(A) and 308(A) of the Oklahoma Administrative Procedures Act, the Oklahoma Corporation Commission (hereinafter the "Commission") hereby submits this Agency Rule Report to the Honorable Frank Keating, Governor of the State of Oklahoma, the Honorable Stratton Taylor, President Pro Tempore of the State Senate, and the Honorable Glen Johnson, Speaker of the House of Representatives. In support of the creation of these new rules, the Commission submits the following information:

1. *DATES OF PUBLICATION OF NOTICE*:

The Commission published its Amended Notice of Proposed Emergency and Permanent Rulemaking in *The Journal Record* of Oklahoma City on June 28, 1996 and July 5, 1996.

75 O.S. 1991, Section 250.4 (A)(2) expressly exempts the Commission from the requirements of 75 O.S. 1991, Sections 303(A) and 303(B) to publish a notice of rulemaking intent in *The Oklahoma Register.*

2. *NAME AND ADDRESS OF THE AGENCY*:

Oklahoma Corporation Commission
P.O. Box 52000-2000
Oklahoma City, Oklahoma 73152-2000

3. *TITLE AND NUMBERS OF THE RULES:*

TITLE 165. CORPORATION COMMISSION

CHAPTER 58. FACILITATION AND PROVISIONING OF PAYPHONE SERVICE [NEW]

SUBCHAPTER 1. GENERAL PROVISIONS [NEW]

165:58-1-1. Purpose; short title [NEW]
165:58-1-2. Jurisdiction [NEW]
165:58-1-3. Application of rules [NEW]
165:58-1-4. Definitions [NEW]
165:58-1-5. Interpretation of rules [NEW]
165:58-1-6. Relief from rules [NEW]
165:58-1-7. Supremacy [NEW]
165:58-1-8. Exceptions and variances in tariffs [NEW]
165:58-1-9. Rules conform to law [NEW]
165:58-1-10. Controversy over rules [NEW]
165:58-1-11. Severability [NEW]
165:58-1-12. Conflict with Commission order [NEW]
165:58-1-13. Conflict with filed tariffs [NEW]
165:58-1-14. Tariff conformance [NEW]
165:58-1-15. Exclusions [NEW]
165:58-1-16. Confidential information [NEW]
165:58-1-17. Public Utility Assessment Fee [NEW]
165:58-1-18. Universal Service [NEW]

SUBCHAPTER 3. CERTIFICATES, REPORTS, AND RECORDS [NEW]

PART 1. CERTIFICATE OF CONVENIENCE AND NECESSITY [NEW]
165:58-3-1. Certificate of Convenience and Necessity [NEW]
165:58-3-2. [RESERVED]
165:58-3-3. Notice of hearing for Certificate of Convenience and Necessity [NEW]

165:58-3-4. Streamlined Certification [NEW]
165:58-3-5. Requirements of a payphone service provider before initiation of service [NEW]

PART 3. GENERAL REQUIREMENTS FOR RECORDS AND REPORTS [NEW]
165:58-3-10. Who shall file [NEW]

PART 5. RECORD REQUIREMENTS [NEW]
165:58-3-20. Location of records [NEW]
165:58-3-21. Retention of records [NEW]
165:58-3-22. Records to be filed with the Commission [NEW]
165:58-3-23. Complaints ledger [NEW]
165:58-3-24. Listing of payphone locations [NEW]

PART 7. REPORTING REQUIREMENTS [NEW]
165:58-3-30. Report attestation [NEW]
165:58-3-31. Due dates of reports [NEW]

SUBCHAPTER 5. GENERAL REQUIREMENTS [NEW]

PART 1. SERVICE REQUIREMENTS [NEW]
165:58-5-1. Minimum service requirements [NEW]
165:58-5-2. [RESERVED]
165:58-5-3. Signage [NEW]
165:58-5-4. [RESERVED]
165:58-5-5. Access to emergency services [NEW]

PART 3. PUBLIC INTEREST PAYPHONES [NEW]
165:58-5-10. Public interest payphones [NEW]

SUBCHAPTER 7. TARIFFS [NEW]

165:58-7-1. Tariffs required [NEW]
165:58-7-2. Information to be included in a payphone service provider's tariff [NEW]
165:58-7-3. Requirements as to size, form, identification, and filing of tariffs [NEW]

165:58-7-3. Requirements as to size, form, identification, and filing of tariffs [NEW]
165:58-7-4. Symbols for changes [NEW]
165:58-7-5. Revisions to tariffs [NEW]
165:58-7-6. Suspension [NEW]
165:58-7-7. Objections [NEW]

SUBCHAPTER 9. MISCELLANEOUS PROVISIONS [NEW]

165:58-9-1. Notification when a payphone service provider withdraws from business [NEW]
165:58-9-2. Responsibilities and penalties [NEW]

SUBCHAPTER 11. OBLIGATIONS OF TELECOMMUNICATIONS SERVICE PROVIDERS [NEW]

165:58-11-1. Obligations of telecommunications service providers to facilitate the provisioning of payphone service [NEW]

SUBCHAPTER 13. FRAUD [NEW]

165:58-13-1. Obligations of telecommunications service providers and payphone service providers regarding fraud [NEW]

4. *STATUTORY AUTHORITY*:

Oklahoma Corporation Commission
Okla. Const. Art. IX, Section 18;
17 O.S. (1991) Section 131

5. *SUMMARY OF THE CONTENT OF THE ADOPTED RULES*:

165:58-1-1 sets forth the purpose of the Oklahoma Corporation Commission rules and regulations governing the facilitation and provisioning of payphone service in the State of Oklahoma.

165:58-1-2 sets forth the jurisdiction of the Commission.

165:58-1-3 sets forth the entities that are subject to the Commission's jurisdiction pursuant to Chapter 58.

165:58-1-4 sets forth definitions used in Chapter 58.

165:58-1-5 sets forth the guidelines for interpreting the rules within the Chapter.

165:58-1-6 sets forth a way by which an entity subject to the Commission's jurisdiction may seek relief from a provision of Chapter 58.

165:58-1-7 sets forth the hierarchy as between Chapter 58 and any tariff, rule, regulation, or agreement relating to the subject matter of Chapter 58. This section also specifies that with regard to telecommunications service providers and IXCs providing payphone service as of January 1, 1996, Chapter 58 is intended to supplement OAC 165:55. In addition, to the extent a conflict arises between Chapter 58 and OAC 165:55, Chapter 58 will supersede OAC 165:55 with respect to the provisioning of payphone service only.

165:58-1-7 sets forth what an entity must do to seek an exception or variance in its tariffs or terms and conditions of service.

165:58-1-9 sets forth the intent of Chapter 58 to be construed to conform with the Oklahoma Constitution and with the laws of the State of Oklahoma.

165:58-1-10 states that when a controversy develops over the rules, any party to the controversy may seek relief from the Commission.

165:58-1-11 states that if any portion of the rules in Chapter 58 are inconsistent or in conflict with other authority, the other authority's rules will supersede that portion of the Commission rules which are in conflict thereto; however, the

remaining portion of the rules shall remain in full force and effect.

165:58-1-12 states that if a prior order issued by the Commission conflicts with the rules in Chapter 58, the rules will supersede the Commission's order to the extent of the conflict.

165:58-1-13 states that if any tariff or term and condition of service conflicts with the rules in Chapter 58, the rules will supersede the tariff or term and condition of service to the extent of the conflict.

165:58-1-14 states the requirement that every certificated IXC or incumbent LEC which currently provides payphone service to the general public shall, on or before September 15, 1996, file such tariffs and tariff revisions, terms and conditions of service, and revisions thereof, as may be necessary to conform to Chapter 58.

165:58-1-15 states that coinless payphones service instruments provided for use only by inmates at state, federal, local and county jails and correctional institutions, as provided for by 17 O.S. (1991) § 139.1, and coinless telephones provided in guest rooms by a hotel/motel, are not subject to the requirements set forth in Chapter 58.

165:58-1-16 sets forth the steps a payphone service provider must take to protect confidential information submitted to the Commission.

165:58-1-17 establishes payphone service providers' responsibilities to contribute to the public utility assessment fee levied annually in accordance with Title 17 O.S. § 180.11 and the provisions of OAC 165:5-3-20 *et seq.*

165:58-1-18 sets forth each payphone service provider's obligation to support universal service in accordance with rules

or regulations as may be promulgated at the State and/or Federal level(s).

165:58-3-1 sets forth the requirement that any person or entity, with the exception of incumbent LECs and certificated IXCs providing payphone service prior to January 1, 1996, that seeks to provide payphone service in Oklahoma must first obtain a Certificate of Convenience and Necessity from the Commission. This rule also sets forth the requirements for the application.

165:58-3-2 is reserved for future use.

165:58-3-3 sets forth the type and duration of notice to be given by a payphone service provider in order to receive a Certificate of Convenience and Necessity to provide payphone service.

165:58-3-4 sets forth the streamline certification process for incumbent LECs and certificated IXCs providing payphone service in the State of Oklahoma on January 1, 1996, in the event they desire to extend the payphone service they were providing as of January 1, 1996, into new territory or change the type of grandfathered services being provided. This rule also sets forth the requirements for the streamlined application.

165:58-3-5 sets forth the requirement that each payphone service provider must provide the LEC from whom they are seeking access, a copy or other specified proof of their Certificate of Convenience and Necessity to provide payphone service, prior to initiating payphone service in the State of Oklahoma.

165:58-3-10 states that all of the record keeping, reporting, and filing requirements listed in Chapter 58 are applicable to all payphone service providers.

165:58-3-20 states that each payphone service provider must maintain its records in accordance with good business

practice, in the normal course of business, at its general office, and must keep the Commission informed as to that location, and ensure that such records are available to Commission Staff upon request.

165:58-3-21 requires payphone service providers to preserve all business records for two (2) years.

165:58-3-22 sets forth what records must be filed with the Commission on an annual basis.

165:58-3-23 requires all payphone service providers to maintain a complaint ledger in a format approved by the Director of the Commission's Consumer Services Division.

165:58-3-24 requires each payphone service provider maintain an updated and current list of its payphone service locations, including street locations and associated telephone numbers, the presubscribed operator service provider, and the contact phone number for the OSP, and make such information available to the Commission Staff upon request.

165:58-3-30 states that all reports required to be filed shall be attested to by an officer or manager of the payphone service provider.

165:58-3-31 sets forth the due dates for all reports that are to be submitted to the Commission.

165:58-5-1 sets forth the minimum service requirements that each payphone service provider must meet and maintain in the provisioning of its payphone service.

165:58-5-2 is reserved for future use.

165:58-5-3 sets forth the signage requirements mandated at each payphone instrument location.

165:58-5-4 is reserved for future use.

165:58-5-5 requires payphone service providers to permit an end-user to dial "911" or "0" to access emergency services, without a coin, and at no charge.

165:58-5-10 reiterates the Commission's authority to designate, establish, or disconnect public interest payphones and determine minimum service requirements for such phones. This rule also requires each payphone service provider to file its proposal for the location and designation of public interest payphones in the State of Oklahoma, and provides all interested parties an opportunity to file comments regarding public interest payphones on or before December 1, 1996.

165:58-7-1 states that a payphone service provider can implement only the rates and charges contained in a Commission-approved tariff.

165:58-7-2 states what information must be included in any payphone service provider's tariff which is to be filed with the Commission.

165:58-7-3 sets forth the requirements for the size, form, identification, and filing of payphone service providers' tariffs.

165:58-7-4 sets forth the notations/symbols which must be utilized to indicate proposed changes to tariffs.

165:58-7-5 sets forth the procedures, notice, and time frame, for revising tariffs on file with the Commission.

165:58-7-6 states that a tariff may be suspended with or without notice or hearing, on recommendation of Commission Staff.

165:58-7-7 sets forth the time frame within which an entity may object to the filing of a tariff.

165:58-9-1 sets forth the requirement to provide a minimum of thirty (30) days advanced notice before payphone service is discontinued in the State.

165:58-9-2 states that each payphone service provider is responsible for abiding by all applicable statutes, rules, regulations, orders and tariffs in the State of Oklahoma, and failure to comply can result in penalties against the responsible provider.

165:58-11-1 sets forth the obligations of telecommunications service providers to facilitate the provisioning of payphone service in the State of Oklahoma.

165:58-13-1 sets forth the obligations of telecommunications service providers and payphone service providers regard fraud.

6. *STATEMENT EXPLAINING THE NEED FOR THE ADOPTED RULES*:

Title 17 O.S. Section 139.1 requires the Corporation Commission to promulgate and enforce operating requirements for coin-activated and credit card-activated telephones available for public use. In addition, on February 8, 1996, the President of the United States signed into law the Telecommunication Act of 1996 ("Act"), wherein, among other things, the local exchange telecommunications market was opened for competition. More specifically, the Act mandated the removal of barriers at the state and/or local level that might have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service which, by its definition includes payphone service. The rules submitted for approval are an attempt by the Commission to address the mandates of 17 O.S. § 139.1 and promote competition in the telecommunications industry consistent with the Act.

7. *DATE AND LOCATION OF MEETING AT WHICH THE RULES WERE ADOPTED*:

On August 7, 1996, in the Third Floor Courtroom, Oklahoma Corporation Commission, Jim Thorpe Building,

2101 North Lincoln Boulevard, Oklahoma City 73105, the Commission adopted the proposed new Chapter 58 and directed the submission of the rules for approval.

8. *SUMMARY OF COMMENTS AND EXPLANATION OF CHANGES OR LACK OF ANY CHANGES MADE IN ADOPTED RULES AS A RESULT OF COMMENTS RECEIVED AT PUBLIC HEARING OR DUE TO ANY ORAL OR WRITTEN COMMENTS RECEIVED PRIOR TO ADOPTION OF THE RULES*:

On April 3, 1996, the Commission issued its Notice of Proposed Emergency and Permanent Rulemaking followed by an Amended Notice of Proposed Emergency and Permanent Rulemaking on May 21, 1996, and a Second Amended Notice of Proposed Emergency and Permanent Rulemaking on June 25, 1996, concerning the establishment of pay telephone rules and regulations. Over a period of three and a half (3 1/2) months, numerous technical conferences, conference calls, and other meetings with industry were held. On July 15, 1996, the Commission Staff submitted to the Commission a set of rules, generally acceptable to all of the participants, with the following noted exceptions or concerns made by industry participants:

AT&T, SWBT, Coinlink, and Cherokee Communications, Inc., expressed concern that the proposed language in 165:58-5-1(1)(3) mandating that payphone service providers "provide end-users access to local directory assistance, free of charge..." (emphasis added) could be interpreted to suggest that the service be provided for free, despite the fact there is a cost associated with providing the service, and the Act establishes that each provider will receive compensation for the services it provides. OAC 165:58-5-1(1)(3) was later amended by deleting the "free of charge" language.

SWBT expressed its concern about the word "convenience" as contained in the proposed language at OAC 165:58-1-4, which defines Public interest payphone as "a Commission-designated payphone instrument which is placed, at a location where there would otherwise not be a payphone, in the interest of making available telecommunications service for public convenience, health and/or safety reasons." (emphasis added.) After reasonable consideration, the Commission determined that the definition merely establishes criteria to be given consideration in establishing/designating public interest payphones, and such determinations/designations will be made on a case-by-case basis in accordance with the provisions contained at OAC 165:58-5-10, therefore, any concerns SWBT might have in that regard could more appropriately be addressed on a case-by-case basis.

Cherokee Communications, Inc., while pleased with the rules overall, expressed specific concerns about OAC 165:58-5-1(1)(1), (2), and (13) setting forth minimum service requirements that would force all payphone service providers to allow access to an end-user's carrier of choice, allow access to emergency calling, and prohibit surcharges for access to a telecommunications service provider, respectively, each as being violative of the Act which, in Cherokee Communication, Inc's opinion, mandates compensation. The Commission, after reviewing the specific provisions and the Act, determined that the enumerated provisions were not inconsistent nor violative of the Act.

In addition, Cherokee Communication, Inc. took exception to the proposed language at OAC 165:58-1(1)(12) which prohibits limiting "...the duration of local calls...". The Commission noted that the referenced provision explicitly provides for exceptions to the rule "for good cause shown, after notice and hearing" and as a rule, the public's best interest is served by prohibiting limitations on the duration of calls.

Cherokee Communications, Inc. also expressed its concern that the rule proposed at OAC 165:58-5-3 requires extensive information on the phone signage, and specifically proposed deleting the requirement to place the hours of operation of the Consumer Services Division of the OCC, on the signage and allowing Cherokee Communication, Inc. some leeway in complying with the signage requirements in Oklahoma. During deliberations the Commission noted that the FCC has established explicit rules regarding signage requirements, and the signage provisions contained at OAC 165:58-5-3 are consistent with those of the FCC and not overly burdensome. In addition, the Commission determined that Cherokee could be distinguished from those payphone services providers for whom signage compliance exceptions were made, in that Cherokee Communications, Inc. does not currently maintain pre-existing payphones with non-conforming signage in the State of Oklahoma.

Coinlink applauded the Commission's responsiveness to the competitive payphone industry's requests to establish payphone rules and permit payphone competition in the State of Oklahoma, but requested the Commission give close consideration to the fact that the competitive market we are aiming to achieve in Oklahoma also invites small businesses to participate, however, provisions in rules that mandate audited financial statements and statutes that mandate publication of notices can be extremely costly, and perhaps even detrimental to small businesses.

The Oklahoma Rural Telephone Coalition ("ORTC") also expressed its general approval of the rules as a whole, but noted that several small, independent LECs do not yet have the technical capability to provide payphone service providers with certain services such as equal access, to permit dialing of 10XXX+0+ calls (See OAC 165:58-5-1(1)(1)), or incoming and outgoing call screening (See OAC 165:58-5-1(1)(7) and

OAC 165:58-11-1(d)) by January 1, 1997; because they are not yet full upgraded with equal-access capabilities, and are not required to be up-graded until not later than July 1, 1998. Post-hearing, the Commission noted the potential conflict posed by the January 1, 1997, compliance date requirement, and also noted that while a "waiver" was always an option available to a provider under the rules, it was more appropriate to avoid any potential conflict in the rules. Therefore, the Commission recommended that Staff draft appropriate language to address the concerns expressed by ORTC and amend any language in the rules that might create the appearance of a conflict between the rules in this regard. Staff subsequently modified the dates for achieving compliance until July 1, 1998, with regard to such services that require equal-access capabilities.

The final issue, which received much attention and oral and written comment, was the Attorney General's proposal to create a rule which would provide a 90-day window of opportunity for payphone site-owners to take "a second look" at their preexisting contracts with the incumbent LECs, and decide whether or not to remain bound by said agreements or, to terminate them without penalty, and renegotiate with a new competitor for more favorable terms. SWBT, ORTC, Coinlink, Chouteau Telephone Co., Cross Telephone Co., Cimarron Telephone Co., Totah Telephone Co., and Pottawatomie Telephone Co. all vehemently opposed the Attorney General's proposal as being unconstitutional, and further challenged the Commission's authority to implement such a rule. SWBT further noted for the record that its current contracts with site-owners were non-exclusive and did not preclude competitors from entering into competitive contracts with site-owners at the same locations. Cherokee Communications, Inc. was the only company who advocate support, at the hearing, for the Attorney General's "second look" proposal. After reasonable deliberation and consideration of the issue, the Commission voted not to entertain such a rule at this time, but rather

suggested its willingness to entertain further discussion and investigation into the matter, should the industry indicate an interest or need to do so.

9. *LIST OF APPEARANCES*:

A list of those appearing at the July 15, 1996, public hearing is attached hereto as Attachment "A-1". A list of those individuals making comments at the hearing on July 15, 1996, is attached hereto as Attachment "A-2".

10. *RULE IMPACT STATEMENT*:

Attached as Attachment "B" is the Rule Impact Statement filed May 31, 1996.

11. *RULES INCORPORATED FROM BODY OUTSIDE THE STATE*:

None

12. *COMMISSION VOTING*:

Commissioners Cody L. Graves, Bob Anthony and Ed Apple voted to adopt the rules and to submit the rules to the Governor and Legislature for approval.

13. *RULES ATTACHED*:

The adopted rules are attached as Attachment "C".

3

APR 8 2003

CLERK

No. 02-1171

IN THE

Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

TELECOR COMMUNICATIONS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal "state action doctrine" applies under Oklahoma antitrust law and, if so, whether both lower courts erred in their fact-bound conclusions that the elements of the doctrine were not proven in this case.

2. Whether under Oklahoma law, both lower courts erred in their fact-bound conclusions that the damages awarded in this case were not clearly, decidedly, or overwhelmingly against the weight of the evidence.

3. Whether under Oklahoma law, the Tenth Circuit erred in holding that the relevant product market was properly defined from the perspective of the Location Owner customer (for whom it was undisputed that payphones were not interchangeable with cellphones), given the undisputed facts that it was the Location Owner (i) to whom payphone providers market their services and for whom payphone providers compete, and (ii) to whom access was denied to competitors as a result of SWBT's anticompetitive conduct.

RULE 29.6 STATEMENT

The following parties are respondents in this proceeding:

Advanced Communications, Inc.
Coinlink, L.L.C.
Jack Keeler, d/b/a Americall
Kenneth Meritt, d/b/a/ Oklahoma Heartland Payphone Services
Don Owens, d/b/a Owens Communications Co.
Payphone Plus, L.L.C.
Redlands Communications, Inc.
Sooner Telecommunications, Inc.
Telecor Communications, Inc.

None of the corporate respondents has a parent company and no publicly held company owns 10% or more of the stock of any such corporation.

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INTRODUCTION

Plaintiffs/Respondents (Plaintiffs) are nine payphone service providers in the deregulated Oklahoma payphone market who alleged that Defendant/Petitioner Southwestern Bell Telephone Company (SWBT) unlawfully maintained its monopoly and restrained trade in violation of federal and Oklahoma antitrust law. After a five-week trial, a jury found SWBT liable for violating *Oklahoma* antitrust law, but *not federal* antitrust law. *1/31/01 D.Ct. Order*, App. 78a.[1]

On appeal, SWBT did not challenge the evidence that it monopolized and restrained trade in the Oklahoma payphone market. Instead, it attempted to escape liability for its "highly successful" anticompetitive conduct by asserting, *inter alia*: (i) a market definition argument that ignored the undisputed facts regarding the relevant market; (ii) a federal "state action doctrine" defense which is inapplicable under Oklahoma law; and (iii) a challenge to the jury's fact finding regarding damages. After the Tenth Circuit rejected these arguments, SWBT paid the judgments and sought this Court's review.

SWBT's Petition does not raise a genuine federal question or any error of law. Instead, it begins with a faulty premise – that there is a conflict between the Tenth Circuit's decision (enforcing *Oklahoma* law) and decisions of other federal circuits (enforcing *federa*l law) – and proceeds to challenge a series of fact-bound conclusions concurred in by the jury and/or the two lower courts. This Court's usual practice is not to review the correctness of lower court interpretations of state law or to

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1. Herein "App.__" refers to Petitioner's Appendix, "Resp. App.__" to Respondents' Appendix, and "SWBT-App__" and "Tel-SApp__" to Appellant's and Appellees' Tenth Circuit record submissions.

correct fact-bound errors. This case presents nothing exceptional to justify a departure from that practice.

COUNTER-STATEMENT OF THE CASE

In its attempt to justify this Court's review, SWBT grossly misstates the record.

A. Structure of the Payphone Market

The Tenth Circuit affirmed the District Court's summary judgment ruling that defined the product market based on the undisputed facts. *Telecor Communications, Inc. v. Southwestern Bell Telephone Co.*, 305 F.3d 1124, 1132-33 (10th Cir. 2002), App. 18a. Chief among those undisputed facts was that payphone providers, like Plaintiffs and SWBT, market their services to upstream location owners (Location Owners) and compete with each other "in supplying payphones to [L]ocation [O]wners." *Id.* at 11a. To Location Owners, who desire payphones to entice traffic to their businesses (SWBT-App 1452), it was undisputed that cellphones are not interchangeable with payphones. *Telecor,* App. 19a.

SWBT challenges the Tenth Circuit's decision by recasting the market structure, ignoring relevant undisputed facts, and then alleging "improper fact-finding" by the lower courts. Pet. 10. SWBT's recast market focuses on downstream payphone end-users (who make payphone calls) and ignores upstream Location Owners (who want payphones installed). Yet SWBT admitted below that Location Owners are the "customer[s] of record" to whom payphone providers "market their payphones." (SWBT-App 0071, 1229). SWBT's anticompetitive conduct was designed to exclude competitors from access to Location Owner customers. *Telecor*, App. 79a. This conduct had the intended effect of allowing SWBT to reap monopolistic profits by paying Location Owners non-competitive commissions (on public

payphones), charging them supra-competitive fees (on semi-public payphones), and depriving them of competitors' better payphones and service. (SWBT-App 0330, 5856-58, 6441-42).

SWBT's Petition labels Location Owners as "distributors," but, as SWBT's economist admitted below, Location Owners are *not* "distributors." (SWBT-App 1876-77). Instead, Location Owners are consumers of payphone services and suppliers of payphone locations. (SWBT-App 0158, 1451). Finally, SWBT claims that payphone providers' "only source" of revenues is end-users, Pet. 3, but revenues also come from other sources, including Location Owners (semi-public fees) and other telephone companies (dial-around fees). (SWBT-App. 0158, 1920). Regardless of the source, payphone providers cannot earn *any* revenues without access to Location Owners.

B. Payphone Regulation and SWBT's Contractual Lock-Up and "Blitz"

The Tenth Circuit rejected SWBT's attempt to use the authority of the Oklahoma Corporation Commission (OCC) to shield it from liability, finding SWBT's "anti-competitive unilateral" conduct was not "regulated," "mandated, "authorized," "reviewed," or "even known about by the OCC." *Telecor*, App. 25a n.7, 26a. SWBT contests these findings by mischaracterizing its conduct and misstating the OCC's authority over and knowledge of that conduct.

In 1990, the Oklahoma legislature changed Oklahoma payphone policy "from monopoly to competition." *Id.* at 2a. As the sole provider of payphones until that time, SWBT had neither used nor needed to use long-term restrictive payphone contracts. (SWBT-App 6321-22, 3221, 3230; Tel-SApp 0421). However, when SWBT learned competition was coming, it began an "intentional campaign" before competitors arrived

(culminating in the "Blitz") to make "entry into the Oklahoma pay phone market more difficult by attempting to secure every possible pay phone location through long-term contracts" with Location Owners. *Telecor,* App. 3a. When competitors arrived in 1996, SWBT had the best locations locked-up with long-term restrictive contracts, effectively foreclosing competitors' entry into the market. (SWBT-App 6330, 6334-35, 6354-55).

Describing this case as the "paradigm of deregulatory transition," SWBT implies its contractual lockup and Blitz were condoned by OCC regulation. They were not. Instead, they were *voluntarily initiated outside the regulatory scheme* for the purpose of subverting the state's new pro-competition policy.[2] The only evidence below was that the OCC did *not* exercise control or supervision over SWBT's pre-November 1996 payphone contracting practices. (SWBT-App 2086). *See Public Service Co. v. Corporation Comm'n*, 918 P.2d 733, 739-40 (Okla. 1996) (OCC authority does not extend to approval of utility's contracts about to be entered into or to its management decisions).

In 1996, the OCC initiated a legislative rulemaking which *was intended* to "promote competition" and *was not intended* to "relieve . . . a payphone service provider from any of its duties" under Oklahoma law. App. 150a; OAC 165:58-1-11.

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2. Federal regulatory policy is not implicated since this case involves enforcement of state antitrust laws and SWBT's claim that "deference" should be given to "state regulatory policy" under the state action doctrine. Pet. 4. Even so, the federal 1996 Telecommunications Act not only mandated payphone competition, it also insured enforcement of the antitrust laws, expressly providing that the Act should not be "construed to modify, impair, or supercede the applicability of the antitrust laws," nor should it be construed to supercede "state, or local laws unless expressly so provided . . . ." Pub. L. 104-104, title vi, § 601(b)(1), 110 Stat. 56, 143.

During the rulemaking, a "fresh look" rule was proposed that would have given Location Owners the opportunity to avoid existing payphone contracts and enter into contracts with competitors. The proposed rule was an "alternative to fact-finding" regarding the contracting practices of incumbents like SWBT. *Telecor*, App. 20a. The OCC made no fact-finding in the proceeding because no evidence was taken. The OCC could not have known about the effect of SWBT's contracts on the market because SWBT falsely represented to competitors that it "was not taking any extraordinary efforts to get contracts" and failed to disclose its "Blitz" to the OCC. (SWBT-App 4695, 4849). Most parties submitting comments during the rulemaking "vehemently opposed" the proposed rule, asserting that the OCC lacked the jurisdiction and evidentiary record to enact it, and that it was unconstitutional. App. 154a; *infra* n.8.

Faced with these objections, the OCC declined to take any action – neither enacting the proposed rule, nor endorsing SWBT's contracts. *Id.* The Tenth Circuit correctly found that an appeal from the OCC's "inaction" was not available under Oklahoma law, and that, in any event, "Plaintiffs [were] not complaining about anything the OCC did or did not do." *Telecor*, App. 26a.

C. The Effect of SWBT's Conduct on the Payphone Market and Plaintiffs' Damages

SWBT implies that its liability was based solely on its contracts and the Blitz. Pet. 8. It was not. The lower courts found that jurors could base SWBT's liability not only on its "whole system of contracts with exclusionary terms," but also on "an abundance of other anti-competitive conduct" designed "to freeze out competition . . . ." *Telecor,* App. 3a, 30a n.8. Jurors were allowed to base liability "on any one or more of" the various forms of anticompetitive conduct, including SWBT's

lockup contracts, its interference with Plaintiffs' relationships with Location Owners, its disparagement of Plaintiffs' products and services to Location Owners, and its refusal to deal with Plaintiffs in order to make it more difficult for Plaintiffs to compete. (SWBT-App 3478, 3481). Numerous Location Owners testified at trial about how SWBT's conduct obstructed their ability to choose competitors' superior payphone services (SWBT-App 5338-54, 6872-75).

While both lower courts found evidence to support the conclusion that SWBT's contracts alone "imposed substantial barriers to making a profitable entry" into the payphone market, the Tenth Circuit found that SWBT engaged in a variety of other conduct that raised the costs of its rivals and prevented Location Owners from switching to competitors, including "erecting a bureaucratic maze," "failing to remove its pay phones when requested to do so," and "damaging" locations when removing its payphones. *Telecor,* App. at 3a-4a, 4a n.2.

SWBT asserts that "plaintiffs successfully competed," suggesting its anticompetitive conduct had a minimal impact on the market. Pet. 8. But implicit in the jury verdicts is a finding that SWBT's conduct excluded competition and restrained trade, thereby injuring Plaintiffs in their business or property. (SWBT-App 3476, 3500, 3506). Through its exclusive contracts and array of other predatory tactics, SWBT protected its lucrative $30 million a year monopoly and excluded competitors from the market. (SWBT-App 6430). Although SWBT predicted before deregulation that open and fair competition would quickly erode its dominant market share and deprive it of 77% of its market revenues, its anticompetitive scheme enabled it to retain 87% of the market after two years of impeded competition. *Telecor*, App. 3a-4a. The resulting injuries to competition included not only the exclusion of competitors, but also the

imposition of technologically inferior payphones and payphone service, lack of choice, and non-competitive prices.

Both Plaintiffs and SWBT presented damage models to the jury which calculated Plaintiffs' damages by considering lost payphones resulting from SWBT's anticompetitive conduct. *1/31/01 D.Ct. Order*, App. 73a; (SWBT-App 8127). After being instructed that it could award past and future lost profits "because of defendant's *past unlawful conduct,*" and that it could not award "purely speculative damages," the jury returned general verdicts awarding Plaintiffs collectively $7,465,450, less than 27% of the amount requested under their damage model. *Telecor*, App. 31a. Both lower courts found sufficient evidence of past and future harm caused by SWBT's past unlawful conduct to support the damage awards. *Id.* at 30a-31a.

REASONS FOR DENYING THE WRIT

I. THE PETITION ONLY RAISES STATE LAW QUESTIONS

The Tenth Circuit affirmed jury findings that SWBT monopolized and restrained trade in violation of Oklahoma antitrust law. Because SWBT was found liable under state law, *the Tenth Circuit's judgment does not implicate federal law.* Nonetheless, SWBT urges as its *sole* justification for certiorari that there is a "conflict" between the Tenth Circuit's decision (enforcing Oklahoma law) and decisions of other circuits (enforcing federal law). Pet. 3. According to SWBT, the purported conflict arises because Oklahoma's antitrust statutes are to be interpreted "in a manner consistent with federal antitrust law." Okla. Stat. tit. 79, § 212. But, as case law illustrates, "consistent with" does not mean "identical to." *See Harolds Stores, Inc. v. Dillard Dept. Stores, Inc.*, 82 F.3d 1533, 1550 (10th Cir.) (Oklahoma antitrust law is similar but "not identical

to" Sherman Act; Sherman Act cases are inapposite where Oklahoma law is different), *cert. denied*, 519 U.S. 928 (1996).

In a recent decision, the Oklahoma Supreme Court underscored how Oklahoma antitrust law differs from federal antitrust law. In *Fine Airport Parking, Inc. v. City of Tulsa*, 2003 OK 27, __ P.3d __ (2003) (not yet released for publication) Resp. App. 1a, the court held that Oklahoma antitrust law does not incorporate the federal "state action doctrine," *id.* at 2a, thereby rejecting a major premise upon which SWBT urges this Court to grant certiorari. *Fine Airport* also explained that the elements of a restraint of trade claim under Oklahoma law are different from federal law. *Id.* at 6a n.5. Finally, *Fine Airport* poignantly noted that state antitrust laws – many of which aim to be consistent with federal antitrust law – differ in important ways. *Id.* at 10a-11a n.8.

In its effort to portray this case as worthy of this Court's attention, SWBT downplays (and in some cases, ignores) the significance of state law in the lower courts' decisions. For example, while SWBT admitted below that Oklahoma law "controls" as to damages, *Pet. for Reh. En Banc.*,13, it now relies on unique verbiage from a federal antitrust remedy statute that is not duplicated in Oklahoma's remedy statute. Pet. 20.

There are important reasons why this Court rarely exercises its certiorari jurisdiction to evaluate the correctness of a lower court's interpretation of state law or to correct fact-based errors – decisions on such matters have limited applicability (*i.e.*, primarily to the case at hand) and thus do not constitute an effective use of this Court's limited resources. *See Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996) (such review is highly exceptional); *Bishop v. Wood*, 426 U.S. 341, 346 (1976) (noting practice of deferring to lower courts on matters of state law); *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938)

(conflict among circuits not reason for granting certiorari as to state law issue). Moreover, because "[s]tate courts are the principal expositors of state law," *Moore v. Sims*, 442 U.S. 415, 429 (1979), any decision by this Court interpreting state law could ultimately be overturned by the state's supreme court. *See id.* at 428 (federal court determination of state law "not binding on state courts and may be discredited at any time").

SWBT's contention that this Court should review the Tenth Circuit's interpretation of Oklahoma law because it discusses federal law is unavailing. Pet. 3 n.4. Notably, the two cases SWBT invokes for support are inapposite and underscore the rationale for denying its Petition. In *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138 (1984), this Court explained that it reviews federal questions considered by state courts -- such as whether a particular interpretation of state law would conflict with federal constitutional or statutory policies – if the question actually compelled (or failed to compel) the lower court's interpretation of state law. *Id.* at 152. Similarly, in *Merrill Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), this Court explained that it can review a federal issue – such as the proper interpretation of a federal regulation relevant to a tort claim – even if it arises in a state cause of action. *Id.* at 816. In neither case, nor any other case of which Plaintiffs are aware, has this Court reviewed a state law question merely because state law endeavors to be consistent with, but is not identical to, federal law.

II. BECAUSE THE FEDERAL STATE ACTION DOCTRINE DOES NOT APPLY UNDER OKLAHOMA LAW, THE QUESTION RAISED BY SWBT'S PETITION IS MOOT

Touting principles of "federalism" and "state sovereignty," SWBT asserts that the Tenth Circuit's application of the federal

"state action doctrine" to Plaintiffs' Oklahoma antitrust claims creates a federal circuit conflict and threatens "state sovereignty" by allowing federal courts to interfere with state regulatory policies. Pet. 12, 19-20. However, in *Fine Airport*, Resp. App. 1a, the Oklahoma Supreme Court recently held that the state action doctrine is *not* incorporated into and does *not* provide immunity under Oklahoma antitrust law. *Id.* at 2a. The court differentiated between a "preemption" defense like state action, which deals with laws of *two* sovereigns, and an "exemption" defense, which reconciles laws of a *single* sovereign. After finding that the state action doctrine, grounded in principles of federalism and state sovereignty, does not apply to Oklahoma antitrust claims, *id.* at 9a-10a, the court affirmed the result below applying an exemption defense. Finding that the state statute in question *expressly permitted* the city, acting as an arm of the state and for the public good, to engage in the specific conduct being challenged, the court held that the Oklahoma legislature intended to immunize that conduct from Oklahoma antitrust law. *Id.* at 14a, 17a-18a.

The *Fine Airport* decision forecloses SWBT's argument that the Tenth Circuit applied the state action doctrine in a manner that creates a circuit conflict, and affirms the District Court's identical post-trial finding that the doctrine was inapplicable under Oklahoma law. *1/31/01 D.Ct. Order*, App. 82a. The Tenth Circuit "decline[d] to address" whether the doctrine applied; instead, it assumed that it did and concurred with the District Court's trial finding that SWBT failed to prove its elements. *Telecor*, App. 24a; (SWBT-App 8330).

With its state action (preemption) argument now moot, SWBT may attempt to assert an exemption (also called "express or implied immunity") argument. Its actions preclude it from doing so. First, SWBT's Petition alleges a conflict between the Tenth Circuit's and other federal circuits' application of *the state*

action doctrine. Pet. i. This Court's Rule 14.1(a) prevents review of a different issue. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 28 (1993) (refusing to review question not presented in petition). Second, the Tenth Circuit did not consider the exemption issue and this Court's general practice is not to review issues not raised or decided below. *See Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983) (federal question must be raised or decided below to be considered). Third, although an exemption defense was available to it under Oklahoma and federal law,[3] SWBT failed to include such a defense in the Pretrial Order as required by Fed. R. Civ. P. 16(e). Finally, SWBT *expressly disavowed* an exemption defense before the Tenth Circuit,[4] no doubt because of the difficulty of proving it.[5]

SWBT's claim for regulatory displacement of antitrust liability cannot even satisfy the requirements of the federal state

3. To reconcile two conflicting state statutes, *Fine Airport* applied the long-standing rule of statutory construction, "to ascertain and give effect to the legislative intent." *Fine Airport*, Resp. App. 14a-15a. As explained in M. Handler, *Antitrust*, 78 Colum. L. Rev. 1363, 1378 (1978), cited in *Fine Airport*, the exemption defense under federal law (express or implied immunity) also reconciles statutes by giving effect to legislative intent.

4. Plaintiffs advised the Tenth Circuit that SWBT's failure to raise implied immunity below precluded its assertion on appeal. *Appellees' Resp.*, at 57. SWBT responded that implied immunity had "nothing to do" with its state action defense. *Appellant's Reply*, at 19 n.21.

5. Exemption immunity is harder to prove than state action immunity because "there is a presumption in favor of antitrust and against implied repeals in the case of exemptions." Handler, *supra* note 3, at 1380; *see also United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719 (1975) (implied immunity requires "convincing showing" of "clear repugnancy" between antitrust laws and regulatory system).

action doctrine, let alone the more demanding requirements of an exemption (implied immunity) defense. As both lower courts found, Oklahoma did not have a clearly articulated state policy to displace competition with regulation (the first prong of the state action doctrine). To the contrary, it was *undisputed below* that state policy mandated payphone competition:[6]

> In July 1990 the Oklahoma legislature superseded the OCC's "sole supplier" policy by enacting Okla. Stat. tit. 17, § 139.1. Section 139.1 mandated that the OCC allow payphone competition in the territories of local exchange telephone companies as SWBT.

(SWBT-App 2085, 4612).

The evidence below proved that SWBT's private anticompetitive conduct was undertaken *outside* the regulatory scheme. *See* Counter-Statement, *infra* at 3-5. SWBT's own positions confirm this. Before the OCC, SWBT argued that the OCC had no "authority" over its payphone contracts. (SWBT-App 2092). Before the District Court, SWBT withdrew any defenses that Plaintiffs' claims against it were "subject in whole or in part to the jurisdiction of the OCC" or the Federal Communications Commission. (TEL-SApp 0005-06).

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6. The foreseeable result of the state's pro-competition policy could not have been the OCC's approval of SWBT's conduct designed "to stymie that competition." *Telecor,* App. 25a. Rather, the "foreseeable result" of a statute that "promotes competition" is that parties "will compete, not that they will preclude competition." *Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 403 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992). None of the supposedly conflicting cases cited by SWBT involve a state policy that *expressly mandated competition.* Pet.12 n.6. Those cases are distinguishable. It was necessary therein to use a "foreseeability" analysis to determine the state's competition policy.

The Tenth Circuit found that SWBT's contractual lockup and Blitz were not "regulated," "mandated," "authorized," "endors[ed]," "reviewed," or even "known" by the OCC. *Telecor*, App. 25a n.7, 26a.

Nor did the OCC exercise "ultimate control" over SWBT's anticompetitive conduct (required to prove the active supervision prong of the state action doctrine).[7] *Id.* at 25a. SWBT's assertion that the OCC was aware and approved of its anticompetitive activities by considering the "fresh look" rule during the payphone rulemaking proceeding is wrong as a factual matter.[8]

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7. SWBT asserts a circuit conflict based upon the holding in *TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir.), *modified on reh'g*, 86 F.3d 1028 (1986), that a regulatory agency's "power" to review challenged conduct is sufficient to prove active supervision even absent knowledge of the challenged conduct. The language SWBT quotes was *affirmatively deleted* from the opinion on rehearing, and was replaced with language reflecting the actual exercise of supervision. *See TEC Cogeneration*, 86 F.3d at 1028. The Tenth Circuit's finding is consistent with the holding in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992), that active state supervision means "active supervision *in fact*."

8. Contrary to the dissent's view of the OCC transcript (which the majority did not allow in the record), neither the OCC, the attorney general, nor competitors knew the scope of SWBT's contractual lockup:

> [P]art of the difficulty is that there is no evidentiary record in this proceeding as to what actions the incumbent LECs have taken. **We don't know if they have suddenly stepped up their efforts to renegotiate these contracts**, if they have posed new additional terms. Maybe they're going out and negotiating longer terms. **We don't know. There's no evidence**.

SWBT Add. to Brief, Tab 11, at 23 (emphasis added).

Faced with a lack of information, no evidentiary record, and vehement objections to its authority, the OCC chose not to act on the proposed "fresh look" rule. *Telecor*, App. 26a. The Tenth Circuit concluded that "[t]he OCC 's refusal to impose the fresh look does not imply that it was endorsing Southwestern Bell's lock-up campaign" but instead "the record suggests that the OCC's ignorance of the lock-up campaign's scope may have contributed to its decision not to impose the fresh look." *Id.* State action immunity is not conferred on regulated parties based merely on a regulatory agency's knowledge or "inaction." *See Phonetele, Inc. v. AT&T*, 664 F.2d 716, 736 (9th Cir. 1981) (state agency did not "embrace" tariff by refusing to strike it down), *cert. denied*, 459 U.S. 1145 (1983).[9]

Finally, this Court should not review this issue since SWBT's other (non-contract) anticompetitive conduct supports liability. *See* Counter-Statement, *infra* at 5-6; *McCord v. Maguire*, 873 F.2d 1271, 1273-74 (9th Cir. 1989) (verdict upheld if supportable on any factual basis)

III. THE TENTH CIRCUIT'S DAMAGE DECISION APPLIES SETTLED LAW AND DOES NOT CREATE A CIRCUIT CONFLICT

SWBT's contention that the Tenth Circuit created a new rule of law permitting damages based on future misconduct misstates the record. The Tenth Circuit held that damages must be based on *past* misconduct and, after a factual analysis, concluded the damage awards *were* supported by SWBT's *past* misconduct. *Telecor*, App. 30a-31a. The lower courts' application of an agreed-upon legal standard to the record facts does not merit this Court's review.

9. The same is true in regard to implied immunity. *See Essential Comm. Systems, Inc. v.* AT&T, 610 F.2d 1114, 1124 (3rd Cir. 1979) (no implied immunity when agency "suspends its judgment [regarding challenged conduct] pending further study").

A. SWBT's Damage Argument Challenges Fact-Bound Conclusions of the Lower Courts

SWBT suggests that the lower courts erroneously decided that the law allows damages for harm arising from future misconduct. But as the Tenth Circuit made clear, "[b]oth parties agree[d] that, in an antitrust case, future damages may be recovered for past misconduct but not for future misconduct." *Id.* at 32a. Consequently, the district court instructed the jury to award damages based upon "defendant's *past unlawful conduct*" and not to award "purely speculative damages." *Id.* at 31a. This Court must presume that the jury followed that instruction. *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 604-05 (1985) (juries presumed to follow instructions and verdict must be upheld if there is plausible support for it).

Because neither lower court committed the error of law urged by SWBT, the only issue is whether they correctly concluded that a reasonable jury could find that SWBT's past misconduct caused harmful future effects. In rejecting SWBT's motion for new trial, the District Court explained that future effects arising from SWBT's past misconduct justified the damages awarded to Plaintiffs:

> Plaintiffs presented evidence demonstrating they suffered future damage due to the effect of [SWBT's] past conduct. . . . To reach the verdict, it was not necessary for the jury to assume [SWBT] would continue to act as it had before trial. Rather, even if [SWBT] immediately ceased all anticompetitive practices following the verdict, *the effects of its prior bad acts* would continue.

1/31/01 D.Ct. Order, App. 73a (emphasis added). The Tenth Circuit upheld the verdicts, noting that appellate courts must

not disturb damage awards "'unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts'." *Telecor*, App. 31a (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931)). Whether the lower courts correctly found that a reasonable jury could decide that SWBT's past misconduct had future effects is not worthy of this Court's review. *See Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) (this Court does not generally review concurrent findings of fact by lower courts).

B. SWBT's Damage Argument Ignores Factual Grounds Supporting the Damage Awards

SWBT contends the jury awarded future damages and that such award was based solely on future enforcement of its contracts. This argument not only misstates the record and ignores other facts supporting the verdicts, it violates the well settled principle that a damage award should not be upset by speculating about how the jurors arrived at it. *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1228 (10th Cir. 2000) (verdict may be supported by any plausible interpretation of evidence). The jurors awarded damages, without specifying their past or future character, using general verdict forms agreed to by SWBT. (SWBT-App 3517-52, 8358-59). SWBT assumes these awards included a component of *future* damages, but because there was evidence which would support awards of *past* damages in amounts exceeding the verdicts, it is equally plausible that the awards do *not* contain such a component. (Tel-SApp 0258-60).

SWBT next assumes that the future enforcement of its Location Owner contracts is the only conduct that could cause future injury. But this flies in the face of *abundant evidence* that the effects of SWBT's past misconduct would invariably

continue beyond trial. Putting aside that the future existence and impact of SWBT's anticompetitive contracts was a "fact" that even SWBT assumed in its damage model (SWBT-App 8157-58), SWBT's "abundance of other anticompetitive conduct" also gave rise to future harms. *Telecor*, App. 30a n.8. *See* Counter-Statement, *infra* at 5-7. Of particular importance is the evidence of future injury Plaintiffs suffered when their future growth rates were stunted by SWBT's past conduct. This undermined Plaintiffs' momentum and reputations in their start-up years and would continue handicapping them in the future (*e.g.*, depriving them of economies of scale/route density, and preventing them from securing key customers who would not consider competitors unless they had achieved minimum volumes of business). (SWBT-App 4310-11, 5248, 5851-52, 5921-22, 6901-02, 7196). As both lower courts noted, this future injury was *in addition to* the future harm caused by the existence of SWBT's contracts past trial. *Telecor*, App. 30a-31a ("Additionally, there was evidence of the business growth Plaintiffs would have experienced if allowed to enter a healthy market when it was newly opened if not for [SWBT's] conduct.").

Finally, during the years prior to trial SWBT used its predatory conduct to stop Plaintiffs from installing 1,863 payphones, each of which meant a lost long-term contract with the Location Owner. Once the fact of their injury was proven, Plaintiffs were only required to present a reasonable estimate of their damages. *Story Parchment*, 282 U.S. at 562-63. The jury could have found that Plaintiffs' inability to install those 1,863 payphones resulted in future lost profits for the term of *Plaintiffs' contracts*, thus supporting the verdicts without regard to the future enforcement of *SWBT's*

contracts.[10] (TEL-SApp 0513, 0515; SWBT-App 6907-10, 6930-31, 7558-59).

C. The Tenth Circuit's Decision Is Not in Conflict with Other Circuits

SWBT argues the Tenth Circuit's decision conflicts with holdings of other circuits that damages cannot be based upon speculative future misconduct. Because the Tenth Circuit clearly held that damages could not be recovered for future misconduct, there is no conflict, and the different results in the cases cited by SWBT stem from their particular facts. In *Connecticut Importing Co. v. Frankfort Distilleries, Inc.*, 101 F.2d 79 (2nd Cir. 1939), and *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957), any future damage was speculative because it depended *solely* upon anticompetitive conduct which would *necessarily occur, if at all, in the future.* Unlike this case, there was no contention or evidence of future harm caused by *past* conduct in those cases cited by SWBT.

In *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 745 F.2d 441 (7th Cir. 1984), the unusual nature of the anticompetitive scheme involved a contract between plaintiffs and defendants which the courts determined could be enforced in many situations without having anticompetitive effects. Future damages were thus speculative because the defendant's past acts (acquiring licensees and denying a plant location) could not legally give rise to a compensable injury *unless combined* with "other tricks,

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10. Courts routinely affirm future damage awards based on anticipated length of business loss. *See Lightening Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1174 (3rd Cir. 1993) (future profits based on 10 year contract); *DeLong Equip. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1203-05 (11th Cir.) (future damages based on projected sales to customers), *cert. denied*, 510 U.S. 1012 (1993).

gambits and ploys" which *necessarily would occur, if at all, in the future. Id.* at 450. In this case, SWBT's *past conduct* was *itself* anticompetitive, legally compensable, and proven to have injured Plaintiffs beyond trial. *Telecor*, App. 30a-31a. SWBT's past conduct included using contracts with thousands of Location Owners (who were not parties below) to capture and lock-up the profitable payphone locations in the market. *Id.* at 30a, 33a. In short, because Plaintiffs felt the "adverse impact" of SWBT's contractual lock-up and other past conduct, they were entitled to recover all future damages flowing therefrom. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971). As in *Ohio-Sealy*, where it was unreasonable to assume Sealy would give back licensees acquired in the past, here there was no reason to assume, *or proof*, that SWBT would give back its captured locations. *See Central Telecomm, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 730-31 (8th Cir. 1986) (damages properly based on monopolist keeping franchise obtained through antitrust violation), *cert. denied*, 480 U.S. 910 (1987).

Without evidence or legal authority, SWBT argues that its thousands of contracts with Location Owners must be legally presumed to disappear or become unenforceable the day after trial, followed by an instantaneous return of a healthy, competitive market. But, as both lower courts noted, *factually* "[t]here was no suggestion or evidence at trial that [SWBT's] contracts would cease to exist or be terminated by [SWBT]," *Telecor*, App. 30a, or even that SWBT would "cease to enforce the contracts." *Id.* at 33a. SWBT's contracts extended beyond trial and contained automatic rollover provisions, causing the lower courts to conclude "they can last forever." *Id.* at 27a. Even SWBT's experts testified that SWBT's contracts would take the covered locations out of competition for the duration of the contracts. (SWBT-App 8306, 8131).

Nor is there a *legal* presumption that "lawful behavior extends to the forfeiture of existing contract rights." *Telecor*, App. 33a. The legal "enforceability" of SWBT's contracts after trial was never before the trial court nor could it have been "in the absence of the thousands of contracting third-party [L]ocation [O]wners." *Id.* Courts do not indulge the legal fiction that contracts disappear or that damages cannot be proven based on the future performance of existing contracts. *City of El Paso v. Darbyshire Steel Co., Inc.*, 575 F.2d 521, 523 (5th Cir. 1978) (antitrust damages provable when contract executed although contract performed into future), *cert. denied*, 439 U.S. 1121 (1979).

D. The Propriety of Injunctive Relief is Not Subject to Review

Persisting in its erroneous assumption that damages were awarded for future misconduct, SWBT claims "the jury was not entitled to award future damages" because the proper remedy was injunctive relief. Pet. 22. SWBT has waived this issue. SWBT admitted below that Plaintiffs could recover damages for "future impact of *past* conduct," SWBT 4/20/00 Memo, p. 11, and the jury was instructed to "calculate each plaintiffs' past and future lost profits." (SWBT-App 3510). SWBT never objected to that instruction on the ground that there was no evidence of future harm from *past* conduct. *See Jabat, Inc. v. Smith*, 201 F.3d 852, 857 (7th Cir. 2000) (permitting jury instructions on future damages waives later claim that future damages could not be awarded). SWBT also agreed to Plaintiffs' withdrawal of injunctive relief after trial. (SWBT-App 3553-54). Ordinarily, this Court will not decide questions not raised or litigated below especially where the party raising the issue "failed to object to a jury instruction . . . ." *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987).

SWBT's suggestion that antitrust law gives equitable remedies preference over legal damages is unsupported and relies on an inapplicable federal statute.[11] Equity acts "only when legal remedies [are] inadequate," *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509 (1959), even when equitable relief is specifically requested. *See DSC Comm. Corp. v. Next Level Comm.*, 107 F.3d 322, 328 (5th Cir. 1997) (future damage award precluded injunctive relief). Consequently, the Tenth Circuit properly concluded that damages were a reasonable way to eliminate the consequences of SWBT's conduct. *Telecor*, App. 35a. A private suit for treble damages "further[s] the overriding public policy in favor of competition." *Perma Life Muffler, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

IV. THE TENTH CIRCUIT'S DECISION AFFIRMING THE RELEVANT PRODUCT MARKET DEFINITION APPLIED SETTLED LAW TO UNDISPUTED FACTS

In its challenge to the Tenth Circuit's market definition analysis, SWBT tacitly concedes that this case involves the application of well-settled legal standards to undisputed facts. Indeed, SWBT alleges not that the Tenth Circuit's analysis creates a circuit conflict or ignores this Court's precedents, but that it is "*likely* to foster significant confusion and circuit conflict." Pet. i, 5 (emphasis added). That is an insufficient basis for this Court's review.

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11. SWBT relies on verbiage in a federal statute ("against threatened loss") that is unlike Oklahoma's remedy statute. *Compare* 15 U.S.C. § 26 *with* Okla. Stat. tit. 79, § 205. Even under federal law the verbiage has no relevance here, since Plaintiffs' damages were based on past conduct.

A. The Product Market Was Properly Defined at the Location Owner Level

For over forty years, lower courts have applied the product market definition analysis set forth by this Court in its landmark *Brown Shoe* and *DuPont* cases that requires an empirical inquiry into what products are reasonably interchangeable. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325-26 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *Telecor*, App. 9a-11a (applying interchangeability analysis). This flexible analysis requires courts to "recognize competition where, in fact, competition exists" in order to evaluate the effect of the alleged anticompetitive practice(s). *Brown Shoe*, 370 U.S. at 326.

In its Petition, SWBT claims payphone competition occurs at the "downstream" end user level. Pet. i. But, SWBT ignores the contrary testimony of its vice president:

> Q: From the standpoint of competitors in the pay phone service business, would you agree that the actual competition that [SWBT] experiences directly from its competitors would be at the level of the site location owners?
>
> A: Yes.

(SWBT-App 0163). Both lower courts found it undisputed that payphone competition occurs at the Location Owner level. *3/01/00 D. Ct. Order*, App. 54a; *Telecor*, App. 11a. Without access to Location Owners, who the Tenth Circuit recognized could be viewed as both *consumers* of payphone services and *suppliers* of payphone locations, *Telecor*, App. 12a, 18a-19a, competitors could not install payphones. (SWBT-App 0071).

The Tenth Circuit's *Brown Shoe/DuPont* analysis is consistent with this Court's admonition in *Mandeville Island*

Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948), that monopolization of a buyer's market – *i.e.*, monopsony power – can violate the antitrust laws: "the Sherman Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Id.* at 236. In a monopsony case, "reasonable interchangeability" under *Brown Shoe/DuPont* is viewed through the eyes of *suppliers*. *Todd v. Exxon Corp.*, 275 F.3d 191, 201-02 (2nd Cir. 2001). Similarly, in the case of an upstream seller's market – *i.e.*, monopoly power – interchangeability is viewed from the perspective of the upstream consumer. *Cass Student Advertising, Inc. v. National Educ. Advertising Serv., Inc.*, 516 F.2d 1092,1097-98 (7th Cir.) (market defined from perspective of college newspapers as upstream consumers), *cert. denied*, 423 U.S. 986 (1975). Viewing interchangeability through the eyes of Location Owners (whether as upstream consumers of payphone services or as suppliers of payphone locations), the Tenth Circuit found it undisputed that "from the Location Owners' perspective, cellular phone services and pay phone services are not interchangeable." *Telecor*, App. 19a.

SWBT does not challenge the Tenth Circuit's *Brown Shoe/DuPont* analysis. Instead, SWBT recasts the market structure in a manner that is contrary to the undisputed summary judgment facts.[12] Even putting aside this Court's aversion to reviewing factual determinations, SWBT's fact-based arguments were not raised below and are thus inappropriate for review. When a

12. SWBT labels Location Owners as "distributors," even though its expert said they are not. (SWBT-App 1876-77). SWBT falsely claims that the only sales in the payphone business are at the downstream level, even though sales occur at the Location Owner level in the form of commissions (public payphones) and fees (semi-public payphones). (SWBT-App 0158, 1451).

litigant fails to challenge certain facts upon which market definition depends and then offers a legal argument that assumes contrary facts, an appellate court has "no basis for upsetting the [district] court's decision . . . ." *United States v. Microsoft Corp.*, 253 F.3d 34, 52 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001). Finally, SWBT's undeveloped references to other issues – which are not raised by the question in its Petition, presented by the record, or preserved for appeal – should not be reviewed.[13] *Izumi*, 510 U.S. at 28; *Kibbe*, 480 U.S. at 259.

As the summary judgment record reveals, the undisputed legal issue before the court was whether SWBT's conduct substantially foreclosed competitors' access to Location Owner customers. (SWBT-App 0072-75, 1230). Aside from creating entry barriers for competitors, SWBT was accused of harming Location Owners by foreclosing their ability to choose competitors who offered them better service, more technologically advanced payphones, and better rates. (SWBT-App. 0072-75). In particular, by controlling the price at the Location Owner level – where SWBT was paying non-competitive commissions on public payphones and charging

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13. SWBT falsely states it was precluded from offering evidence of the *alleged* impact that cell phone usage had on the payphone market. Pet. 29 n.14. SWBT offered such evidence, prompting the district court to note "that's been a contention from the beginning of this trial." (SWBT-App 6607-10, 8191-94, 8320). SWBT falsely implies the relevant market instruction confused jurors about where to look for injury in that market. Pet. 29 n.14. The jury was *not* confused. Both parties' counsel and experts, as well as *other jury instructions*, directed jurors to the Location Owner level. (SWBT-App 6298, 6513, 8438). As SWBT's counsel and economist told the jury, "the market in this case [is] the market for provision of payphone service, both public and semi-public, to [L]ocation [O]wners. . . ." (SWBT-App 8183). In any event, as the Tenth Circuit noted, SWBT waived any objection to the market definition instruction by agreeing to it. *Telecor*, App. 5a.

supra-competitive fees for semi-public payphone service – SWBT was accused of maintaining its monopoly and reaping monopoly profits in that market. (SWBT-App 0330, 6441-42).

The cases SWBT cites reveal how dramatically its legal argument veers from market definition, and how reliant it is upon portraying the market structure contrary to the undisputed facts. SWBT cites *Omega Envt. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997), *Roland Mach. Co. v. Dresser Indust., Inc.*, 749 F.2d 380 (7th Cir. 1984), and *Microsoft*, 253 F.3d at 34. These cases address the sufficiency of a plaintiff's proof of liability after the market is defined, not the market definition standard. Moreover, none involve the issue here – whether a market may be defined at a level other than the ultimate consumer level. The cited cases defined the market at the ultimate consumer level because competition occurred at that level. Thus, SWBT has not identified a conflict with the Tenth Circuit's decision defining the market at the Location Owner level, where it was undisputed that competition occurred.[14]

B. The Tenth Circuit's Decision Is Consistent with the Settled Principle that Antitrust Law Protects the *Competitive Process*, Not Particular Market Participants

Plaintiffs proved the only anticompetitive effects they were required to prove under the jury instructions in this case – injury to competition in the *relevant* market (at the Location Owner

14. Without identifying them as "conflicting" cases, SWBT cites *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed Cir. 1999) and *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216 (2nd Cir. 1999). *AD/SAT* involved the unique requirements for "monopoly leveraging," a claim not at issue here. *Integraph*, which addresses a plaintiff's failure to show that competition occurred between itself and the defendant in *any* market, *id.* at 1354-55, confirms that the Tenth Circuit properly focused on the market in which *Plaintiffs and SWBT competed.*

level).[15] Although it never objected to those jury instructions, SWBT urges this Court to adopt a new rule for monopolization claims involving an input or upstream market.

Without support from either this Court or the circuit courts, SWBT calls for a change from the current approach which requires proof of injury to competition in the *relevant* market, to an approach that would also require proof of injury to competition in a downstream ultimate consumer market if the *relevant* market is defined upstream. While this argument poses a question not presented by the facts of this case – since Plaintiffs also proved harm to the ultimate consumers of payphones[16] – it ignores the fact that the goal of the antitrust laws is protection of the *competitive process*, not a particular market participant. *Brown Shoe,* 370 U.S. at 320 (antitrust laws were enacted to protect "*competition*, not *competitors*"). This Court has consistently held that antitrust laws condemn anticompetitive practices which injure competition, without regard to market

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15. In the Pretrial Order, SWBT agreed that the relevant product market was defined at the Location Owner level, and the case was thereafter tried on that basis. (SWBT-App 2157,6298, 8183). Under the jury instructions agreed to by SWBT, the only injury to competition that Plaintiffs were required to prove was in this relevant market. (SWBT-App 3479). For example, to determine if SWBT had monopoly power, jurors were directed to consider the competitiveness of commissions paid by SWBT to Location Owners. (SWBT-App 3471). Plaintiffs proved their exclusion from this relevant market, *Telecor*, App. 4a, and that Location Owners thereby suffered from non-competitive commissions, and from inferior quality payphones. *Id.*

16. As the Tenth Circuit noted, Plaintiffs proved injury flowing from SWBT's exclusionary conduct, not only to the relevant customers (Location Owners), but also to payphone end-users who suffered from inferior quality payphones, lack of choice, and higher call rates. *Telecor*, App. 4a; (SWBT-App 5856-59, 4045).

level. *Mandeville,* 334 U.S. at 235-36 (condemning price fixing conspiracy by purchasers that impacted sellers of sugar).[17]

In the years since this Court decided *Mandeville*, numerous courts and commentators have reiterated that the antitrust laws provide a remedy for monopsony and competitive injury to input or upstream markets. As Judge Wald summarized, "restraints on input markets can be as destructive of a free market economy (and therefore ultimately damaging to consumers) as restraints on output markets. . . . So, even proceeding from the premise that the antitrust laws aim only at protecting consumers, monopsonies fall under antitrust purview. . . ." *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1061 (D.C. Cir. 1995) (Wald, J., dissenting), *aff'd*, 518 U.S. 231 (1996). *See Todd*, 275 F.3d at 202 (proper market was one in which interchangeability was viewed from perspective of seller, not consumer); *Alexander v. National Farmers Org., Inc.*, 687 F.2d 1173, 1193 (8th Cir. 1982) (predatory conduct found in upstream marketing of raw milk), *cert. denied*, 461 U.S. 937 (1983); *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1292, 1306 n.12 (9th Cir.) (franchise [input] market defined although ultimate sales were to consumers and there was no showing of effect on consumer price), *cert. denied*, 459 U.S. 1009 (1982); HERBERT HOVEMKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 16 (1999) ("monopsony . . . is just as inconsistent with consumer welfare as monopoly").

In none of the cases involving anticompetitive practices directed at input sellers and at upstream consumers have courts

17. *See also American Tobacco Co. v. United States*, 328 U.S. 781, 803-04 (1946) (applying antitrust law to restraints on input market for tobacco); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (agreements to purchase inputs at or under market are species of price-fixing); *Swift & Co. v. United States,* 196 U.S. 375, 394 (1905) (applying antitrust law to restraint on livestock inputs).

required plaintiffs to prove not only injury to competition in that relevant market, but also in an end-user market. *See, e.g., Mandeville*, 334 U.S. at 247-48 (Jackson, J., dissenting) (explaining that majority opinion held monopsony claim valid even though it did not specify injury to end users). SWBT's reliance on *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261 (7th Cir. 1984), for the proposition that ultimate consumer harm must be shown is misplaced. The Seventh Circuit later rejected such a rule in *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986), finding no case in which this Court has required plaintiffs to "articulate how the welfare of the ultimate consumer has been diminished by an injury to competition at *another* level." *Id.* at 536.

C. The Petition's Undeveloped Antitrust Injury Argument Does Not Merit Review

SWBT's Petition contains a number of references to the question of "antitrust injury" and implies that Plaintiffs failed to meet this requirement. Pet. 24, 29. As this Court explained in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), "[p]laintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* at 489. The antitrust injury requirement is related to, but distinct from, the more general requirement of "antitrust standing." *See Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-44 (1983) (setting out multi-factor test for antitrust standing).

Given that SWBT did not raise antitrust injury or antitrust standing before the Tenth Circuit, it is not surprising that neither the majority nor dissenting opinions even allude to these

requirements. For this and a variety of other reasons, SWBT failed to preserve the issue for this Court's review.[18]

Without a more clearly framed issue for review and a developed discussion below, it is hard to identify SWBT's argument. However, it appears SWBT's complaint is that Plaintiffs were not the proper parties to challenge its anticompetitive conduct in this case. Pet. 24, 28 n.13. As competitors who were the intended victims of SWBT's predatory conduct (aimed at excluding Plaintiffs and other competitors from the relevant market), Plaintiffs suffered precisely "the type of loss that the claimed violations . . . would be likely to cause," and thus could bring an antitrust claim. *Pueblo Bowl-O-Mat*, 429 U.S. at 489. A showing of antitrust injury and "the case for relief will be strongest where competition has been diminished." *Id.* at n.14. *See also* 2 Areeda, Hovencamp, & Blair, ANTITRUST LAW ¶ 348d1, at 392 (2000) ("Standing is clear and seldom challenged when the plaintiff alleges that its rival engaged in an exclusionary practice designed to rid the market of the plaintiff . . . so that the defendant could maintain or create a monopoly."). Plaintiffs' standing as excluded competitors is also clear under Oklahoma monopoly law which permits liability based *solely* on the defendant's power to "exclude competition." App., 103a.

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18. Issues not pressed or passed upon below are generally not reviewed by this Court. *Gates*, 462 U.S. at 218 n.1. SWBT not only failed to file any Rule 50 motion at trial testing Plaintiffs' proof of antitrust injury, it admitted that Plaintiffs suffered such injury by presenting a damage model at trial which awarded damages using the same methodology as Plaintiffs (*i.e.*, lost payphones and associated revenues as a result of SWBT's conduct). (SWBT-App. 8129). SWBT also did not object to the jury instructions which allowed jurors to find, as they did find, that "damage flowed to [Plaintiffs] as a result defendant's antitrust violations." (SWBT-App 3507). *See Kibbe*, 480 U.S. at 259 (no review justified where petitioner failed to object to jury instructions).

Plaintiffs' injury (inability to place payphones) was caused by having been excluded from the relevant (Location Owner) market and was measured by their lost share of that market (*e.g.* lost payphones). (SWBT-App 6443-44, 6966). Once the fact of injury was shown, damages could be calculated in any reasonable fashion. *Story Parchment,* 282 U.S. at 562-63. That Plaintiffs' damages were calculated by considering past and future lost profits they would have earned from lost payphones in the relevant market is appropriate, unremarkable, and does not alter the direct link between Plaintiffs' injuries and SWBT's anticompetitive conduct. *See National Farmer's Org. v. Associated Milk Producers, Inc.,* 850 F.2d 1286, 1293. n.4 (8th Cir. 1988) (farmer's organization impaired from competing in milk sales market suffered "antitrust injury" from lost market penetration, and could measure damages by lost membership dues and checkoff fees), *cert. denied*, 489 U.S. 1081 (1989).

SWBT's conduct that excluded Plaintiffs from the market is the same conduct that injured competition by depriving Location Owners of the ability to choose competitors' superior payphones and payphone services.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX — DECISION OF THE SUPREME COURT OF THE STATE OF OKLAHOMA DATED AND FILED MARCH 11, 2003

2003 OK 27

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 96,748

FINE AIRPORT PARKING, INC.,

Appellant,

v.

THE CITY OF TULSA;
THE TULSA AIRPORT AUTHORITY;
THE TULSA AIRPORTS IMPROVEMENT TRUST,

Appellees.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, DIV. I

BOUDREAU, Justice:

¶1 Fine Airport Parking, Inc. (Fine) appealed the district court's dismissal of its state antitrust cause of action against the City of Tulsa and its public authorities, the Tulsa Airport Authority and the Tulsa Airports Improvement Trust (collectively Tulsa). The dispositive issue in this appeal is whether the district court erred in dismissing Fine's petition.

Appendix

The appeal presents two underlying questions: 1) Is the federal doctrine of state action immunity incorporated into the Oklahoma Antitrust Reform Act, 79 O.S.2001, §§ 201, *et seq.* and 2) Is Tulsa's operation of an airport parking facility as authorized by the Municipal Airports Act, 3 O.S.2001, §§ 65.1, *et seq.* subject to the Oklahoma Antitrust Reform Act. We answer both questions in the negative. We vacate the opinion of the Court of Civil Appeals and affirm the district court's dismissal order.

I. Background

¶2 Tulsa, through its Airport Authority, operates Tulsa International Airport and various related facilities and services on the airport grounds, including parking facilities for use by the airport customers. Fine operates an off-airport parking business and competes with the Airport Authority to provide parking to the airport customers.

¶3 In May 2001, Fine filed suit in the state district court in Tulsa County alleging that Tulsa violated the state antitrust statutes by its exclusionary practices in operating its parking facilities at the Tulsa Airport. Specifically, Fine alleged that Tulsa excluded competition by setting and maintaining parking prices with unreasonably low profit expectation, a practice that has prevented Fine's off-airport parking business from successfully competing for airport parking customers. Tulsa moved to dismiss Fine's petition for failure to state a claim on the grounds that it is immune from antitrust liability for the conduct at issue under the federal doctrine of state action immunity because its conduct is specifically authorized by state statute. Tulsa also sought dismissal because Fine

failed to allege a relevant market and specific intent to monopolize.[1]

¶4 The trial court determined that the federal doctrine of state action immunity, as enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed.2d 315 (1943) and its progeny, is incorporated into the Oklahoma Antitrust Reform Act. The trial court found that the doctrine immunized Tulsa from antitrust liability because its conduct was authorized by the Municipal Airports Act. Accordingly, the trial court dismissed Fine's petition.

¶5 The Court of Civil Appeals affirmed the trial court. It determined that Tulsa is immune from liability under the state antitrust law by virtue of the federal doctrine of state action immunity. It also affirmed the trial court on an independent ground that Tulsa's conduct was immunized because the operation of the airport parking facility is within the city's police powers. We previously granted Fine's petition for certiorari review.

II. Standard of Review

¶6 The function of a dismissal motion is to test the law's support for a claim, not the sufficiency of the facts. *Zaharias v. Gammill*, 1992 OK 149, ¶6, 844 P.2d 137, 138. In this case, the trial court dismissed Fine's petition for want of any legal liability on the part of the Tulsa defendants. The order dismissing Fine's petition for failure to state a claim upon which relief may be granted is reviewed *de novo*. *Lockhart v. Loosen*, 1997 OK 103, ¶4, 943 P.2d 1074, 1077.

1. Because we resolve this appeal on other grounds, we do not address the relevant market and intent to monopolize issues.

¶7 Further, the underlying questions presented on certiorari call for interpretation and construction of the Oklahoma Antitrust Reform Act and the Municipal Airports Act. Statutory construction presents a question of law that is subject to an appellate court's plenary, independent and nondeferential reexamination. *Arrow Tool & Guage v. Mead*, 2000 OK 86, ¶6, 16 P.3d 1120, 1122-23.

III. The Federal Antitrust State Action Immunity Doctrine

¶8 The Sherman Antitrust Act, 15 U.S.C. § 1, expresses our national policy against concerted activity that results in monopolies and restraints of trade.[2] However, in our federal system of dual sovereigns, federal law against anti-competitive conduct is not applied to governmental activities of the sovereign states. *Parker v. Brown*, *supra*, enunciated the doctrine of state action immunity from federal antitrust liability. Analyzing and interpreting the federal antitrust statute, *Parker* found no suggestion of congressional intent

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2. 15 U.S.C. § 1 reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

to restrain state action directed by state statute. 317 U.S. at 350-51, 63 S.Ct. at 313. Relying on fundamental principles of federalism and preemption, *Parker* concluded that the federal antitrust statute did not undertake to prohibit restraint on competition imposed by a sovereign state as an act of government. 317 U.S. at 352, 63 S.Ct. at 314. *See also*, Milton Handler, *Antitrust*, 78 Columbia L.R. 1363, 1374-80 (1978).

¶9 For purposes of federal antitrust law, a sovereign state can also immunize a municipality's conduct. However, to afford immunity to a municipality, the state must do something more than simply direct the municipality's conduct. *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 414-15, 98 S.Ct. 1123, 1137-38, 55 L.Ed.2d 364 (1978). The state action immunity doctrine will protect a municipality's anti-competitive conduct from federal antitrust liability only where 1) there is a clearly expressed state policy to displace competition with municipal regulation and 2) the anti-competitive regulation is supervised by the state. *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1989). The first prong of this two-prong analysis is satisfied if the restraint on competition is a foreseeable result of the activity authorized by state statute. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373, 111 S.Ct. 1344, 1350, 113 L.Ed.2d 382 (1991). The second prong is satisfied if the municipality actively supervises the regulation. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47, 105 S.Ct. 1713, 1720, 85 L.Ed.2d 25 (1985).

Appendix

IV. In the Oklahoma Antitrust Reform Act, 79 O.S.2001, §§ 201, *et seq.*, the Legislature has made unlawful those restraints on trade that prejudice the public.

¶10 Our constitution expresses this state's policy against monopolies and restraints of trade. It forcefully provides that "monopolies are contrary to the genius of a free government". Okla. Const., art. 2, § 32. It also mandates that the "Legislature shall define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, and enact laws to punish persons engaged in" such unlawful activity. Okla. Const., art. 5, § 44.

¶11 Pursuant to that constitutional mandate, our earliest statutes prohibited conduct in restraint of trade.[3] In 1998, the Legislature enacted the most recent version of our antitrust statutes, the Oklahoma Antitrust Reform Act.[4] In addition to the general prohibition against restraints of trade in § 203(A), the Act specifically makes it unlawful for a person[5] 1) to

3. The following language, similar to that used in the federal statute set out in footnote 2, has been a part of our statutes since statehood: "Every act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal." Laws of 1907-8, p. 750, Complied Laws of 1909, § 8800, now codified at 79 O.S.2001, § 203(A).

4. 1998 Okla.Sess.Laws, ch. 356, created the Oklahoma Antitrust Reform Act and repealed the existing antitrust statutes.

5. The state antitrust statutes expressly prohibit every unilateral "act" of anti-competitive conduct. However, restraint of trade or (Cont'd)

monopolize or attempt to monopolize any part of trade or commerce in a relevant market in § 203(B), or 2) to unreasonably refuse access to an essential facility in § 203(C), or 3) to discriminate in the price of a commodity between different purchasers in § 204.[6]

¶12 Because nearly every regulation of trade and every agreement concerning trade constitutes a restraint of trade to some extent, the courts have rejected a literal reading of the antitrust statutes. *Teleco, Inc. v. Ford Industries, Inc.*, 1978 OK 159, ¶7, 587 P.2d 1360, 1362-63. Similar to the Sherman Antitrust Act, the state antitrust law has been interpreted to prohibit only those acts that unreasonably restrain trade or commerce. *Id.*

¶13 This Court has followed the interpretation of the federal antitrust statute in deciding what is an unreasonable restraint of trade under the Oklahoma antitrust statutes. *Id.* at ¶8, 1363. *See also, Beville v. Curry*, 2001 OK 1, ¶12, 39 P.3d 754, 759. Restraint of trade that has a pernicious effect on competition is conclusively presumed unreasonable and a *per se* violation of the antitrust statutes. *Teleco, Inc. v. Ford Industries, Inc.*, 1978 OK 159, at ¶8, 587 P.2d at 1363. Other restraints are tested by a rule of reason to determine if the

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commerce imposed unilaterally by government officials is not a violation of the federal antitrust statute which requires an element of concerted action. *Fisher v. City of Berkley*, 475 U.S. 260, 266-67, 106 S.Ct. 1045, 1049, 86 L.Ed.2d 206 (1986).

6. The constitution also prohibits discrimination in the sale of commodities. Okla. Const., art. 9, § 45.

activity unduly restricted competition and unreasonably prejudiced public interest. *Board of Regents v. National Collegiate Athletic Association*, 1977 OK 17, ¶15, 561 P.2d 499, 505-6. "The fundamental test of the reasonableness of an action, which, by its nature, restrains trade, is its effect on the public." *Krebsbach v. Henley*, 1986 OK 58, ¶29, 725 P.2d 852, 858.

V. Municipalities are not immune from the Oklahoma Antitrust Reform Act, 79 O.S.2001, §§ 201, *et seq.*, under the federal doctrine of state action immunity.

¶14 While the Oklahoma Antitrust Reform Act is inapplicable to the state itself, the Act clearly expresses a legislative intent to subject municipalities to its proscriptive reach. The Act defines "Person" to include a "municipal corporation, including any public trust which has a municipal corporation as its beneficiary," and to exclude the "State of Oklahoma, its departments, and its administrative agencies," with some exceptions. 79 O.S.2001, § 202(3).

¶15 The Act also commands that it be interpreted and applied consistent with the federal antitrust law. Title 79 O.S.2001, § 212 provides: "The provisions of this act shall be interpreted in a manner consistent with Federal Antitrust Law 15 U.S.C., Section 1 et seq. and the case law applicable thereto." Tulsa argues that § 212 compels the conclusion that the Legislature intended to adopt the federal doctrine of state action immunity and that it is immune from state antitrust liability under the circumstances of this case. We disagree.

¶16 *Parker* concluded that the federal antitrust statute did not undertake to prohibit restraint on competition imposed by a sovereign state as an act of government. 317 U.S. at 352, 63 S.Ct. at 314. *Parker* fashioned the state action immunity doctrine to protect the sovereign states' power to regulate commerce with respect to matters of state concern not preempted by Congress. 317 U.S. at 359-60, 63 S.Ct. at 317-18. Under the Parker doctrine, a municipality may also be clothed with the state's immunity from federal antitrust liability where the state has delegated its regulatory power to the municipality. *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. at 414, 98 S.Ct. at 1137. Application of the *Parker* doctrine to a municipality when it is carrying out state policy allows the states to use their municipalities to administer state regulatory policies free from federal antitrust liability. *Id.*, 435 U.S. at 415-16 and 98 S.Ct. at 1138.

¶17 The *Parker* immunity doctrine rests on principles of federalism and comity in the realm of trade regulation as a means of protecting the delicate relationship between the federal and state governments, both of which are sovereign. 317 U.S. at 359-60, 63 S.Ct. at 317-18. The principles of federalism that govern the relationship between the two sovereigns, the federal and state governments, do not apply to the relationship between a state and a municipality acting pursuant to state law.

¶18 In the relationship between Oklahoma and its municipalities, the state is the sovereign and the municipality

is a political subdivision of the state.[7] The state delegates power to the municipality and the municipality exercises that power subject to the control of the state. *City of Sapulpa v. Land*, 1924 OK 92, 101 Okla. 22, 223 P. 640, 646. The principles of federalism supporting the *Parker* doctrine are meaningless in an analysis of municipal liability under the Oklahoma Antitrust Reform Act.

¶19 We agree with the reasoning expressed by the Wisconsin Supreme Court in *Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321 (1982).[8]

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7. Pursuant to the Oklahoma Constitution, the Legislature must provide for the incorporation and organization of cities and towns by general laws (art. 18, § 1); municipalities are subject to the general laws of this state (art.18, § § 2 and 3,); and, municipalities may engage in any business which the municipality has the power to franchise (art. 18, § 6). Under these provisions, municipalities are corporate bodies capable of many acts of private corporations as well as acts of government. *City of Blackwell v. Lee*, 1936 OK 767, ¶ 5, 62 P.2d 1219, 1220.

In *City of Lafayette, La. v. Louisiana Power & Light Co., supra.*, the city argued that its status as a municipality automatically afforded it state action immunity. The U.S. Supreme Court refused to afford the city the same deference it afforded the states, explaining that cities are not sovereign and they are not free to pursue their parochial interests via anti-competitive conduct. *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. at 411-13, 98 S.Ct. at 1136.

8. For the most part, the decisions of other sister jurisdictions considering application of the *Parker* doctrine are inapposite because of their respective state statutes. Three states have rejected the federal state action immunity doctrine. Massachusetts did so because its (Cont'd)

Appendix

In rejecting the federal state action immunity doctrine, the Wisconsin court said:

> . . . The *Parker* decision rested on general principles of federalism involving the relationship of the federal government to the sovereign states, and on the specific constitutional limits on

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antitrust statutes explicitly provided that the law did not apply to any activities subject to regulation or supervision by state agencies, *Monsanto Co. v. Dept. of Public Utilities*, 412 Mass. 25, 586 N.E.2d 982 (1992). New Jersey did so because its antitrust statutes specified that the law shall not apply to any activity directed or authorized or permitted by any conflicting or inconsistent statute, *Fanelli v. City of Trenton*, 135 N.J. 582, 641 A.2d 541 (1994). New York, at least by implication, determined that its state antitrust statutes did not provide for state action immunity comparable to the federal doctrine. *Capital Telephone v. New York Telephone*, 540 N.Y.S.2d 895 (A.D.3 Dept.1989). However, three states have followed the federal state action immunity analysis. Louisiana did so because its antitrust statute did not expressly include or exclude municipalities, *Reppond v. City of Denham Springs*, 572 So.2d 224 (La.App. 1 Cir.1990). Colorado did so because its antitrust statute specifically provided that persons and activities immune from federal law are immune from state law, *City of Colorado Springs v. Mountain View Electric Association, Inc.*, 925 P.2d 1378, 1387 (Colo.1996). Illinois held that an airport authority is protected by the state action immunity doctrine in *DuPage Aviation Corp. v. DuPage Airport Authority*, 229 Ill.App.3d 793, 54 N.E.2d 1334, 171 Ill.Dec. 814 (1992), but subsequently decided that its antitrust statutes expressly provide that no provision of the antitrust statutes shall be construed to make activities of a unit of local government illegal, *Alarm Detection Systems, Inc. v. Village of Hinsdale*, 326 Ill.App.3d 372, 76 N.E.2d 782, 226 Ill.Dec. 599 (2001).

> federal power contained in the tenth and eleventh amendments. (Footnote omitted.) These principles are not present in this case. The relationship between the federal government and the states is not parallel to the relationship between the state government and the cities. Cities are creatures of the state, derive their power from it, and are not recognized as independent sovereigns. (Citation omitted.) The concern in *Parker* and recent United States Supreme Court cases applying it (Footnote omitted.) has to do with potential conflicts between the laws of two different sovereigns—federal and state governments.
>
> By contrast, the present case involves a conflict between the state laws dealing with municipalities and the state antitrust law. The rationale behind the *Parker* exemption is not applicable to this type of case. . . .

314 N.W.2d at 324.

¶20 The Oklahoma Antitrust Reform Act expressly includes municipalities in the definition of "person" subject to its provisions in § 202(3). Nevertheless, Tulsa argues that § 212, which requires that our antitrust statutes be interpreted consistent with federal law, implicitly adopts the federal doctrine of state action immunity as applied to municipalities. We disagree. We will not apply a rule of construction to render meaningless express provisions of the Act, such as the definition of "person" in § 202(3). Accordingly, we reject Tulsa's argument. We conclude that municipalities are not

immune from the Oklahoma Antitrust Reform Act under the federal doctrine of state action immunity.

VI. The Municipal Airports Act, 3 O.S.2001, §§ 65.1, *et seq.*, authorizes municipalities to operate and regulate parking facilities and fix the rates for the parking services at municipal airports for the benefit of the public and as a public necessity without regard to the anti-competitive effects.

¶21 More than half a century ago, the Legislature authorized municipalities to plan, develop, and operate public airports by enacting the Municipal Airports Act.[9] In comprehensive terms, the Act authorizes every municipality to plan, develop, construct, maintain, equip, operate, regulate, protect and police public airports, "including the construction, installation, equipment, maintenance and operation at such airports of buildings and other facilities for the servicing of aircraft or for the comfort and accommodation of air travelers". 3 O.S.2001, § 65.2(a). The Act recognizes that air travel is imbued with public purpose and airports are a public necessity by declaring that the exercise of "powers herein granted to municipalities" are "public and governmental functions, exercised for a public purpose, and matters of public necessity". 3 O.S.2001, § 65.16.

¶22 One of the powers the Act grants to municipalities is the power to regulate airport parking. The Act provides that in making airport facilities and services available, a "municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services,

9. 1947 Okla. Sess. Laws, p. 22, is the original enactment.

which shall be reasonable and uniform for the same class of privilege or service and shall be established with due regard for the property and improvements used and the expenses of operation to the municipality." 3 O.S.2001, § 65.5(a)(3). It also provides in specific terms that a municipality may adopt such regulations as it deems necessary for the management, government and use of the municipal airport, 3 O.S.2001, § 65.8(a).

¶23 In enacting the Municipal Airports Act, the Legislature vested municipalities with broad regulatory and administrative powers in operating public airports. Among those powers, the Act authorizes municipalities to establish the terms and conditions and fix the charges for airport facilities and services. It follows logically that such regulation may have anti-competitive effects. In other words, the Act allows a municipality to operate parking facilities at its public airport and to fix reasonable rates for the parking services without regard to the anti-competitive effects.

VII. Because the Legislature intended to allow a municipality to operate parking facilities at a municipal airport as an arm of the state for the public good, a municipality may, like the state itself, fix the rate for airport parking service even though it may have anti-competitive effects.

¶24 The overriding issue in this case is the reconciliation of two ostensibly conflicting enactments of a single sovereign—the State of Oklahoma. The Oklahoma Antitrust Reform Act makes it unlawful for a person, including a municipality, to monopolize or attempt to monopolize any

part of trade or commerce in a relevant market. 79 O.S.2001, § 203(B). On the other hand, the Municipal Airports Act allows a municipality to operate and regulate parking facilities and fix the rate for parking services at the municipal airport without regard to the anti-competitive effects. 3 O.S.2001, § 65.5(a)(3). In resolving this apparent inconsistency between a state law dealing with municipalities and the state antitrust law, the job quite simply is to ascertain and give effect to legislative intent. *City of Durant v. Cicio*, 2002 OK 52, ¶13, 50 P.3d 218, 221. *See also*, Milton Handler, *Antitrust*, 78 Columbia L.R. 1363, 1378 (1978).

¶25 In resolving this statutory conflict, we are mindful that the exercise of municipal authority is subject to the general laws of the state. *City of Sapulpa v. Land*, 223 P. at 646. Where municipal conduct is challenged under a general statute, the statutory grant of municipal authority must be strictly construed in favor of the general statute. *Y & Y Cab Service v. City of Oklahoma City*, 1933 OK 547, 167 Okla. 134, 28 P.2d 551, 552-53. Absent an express exemption, a municipality's conduct cannot be exempted from the proscriptive reach of a general statute unless the express provisions of a conflicting state statute permits or authorizes the municipality to engage in conduct that is inconsistent with or contrary to the general statute.

¶26 The Oklahoma Antitrust Reform Act is a general statute of statewide concern that uniformly applies to every municipality. It is designed to prohibit anti-competitive conduct that is harmful to the public. *Board of Regents v. National Collegiate Athletic Association*, *supra.*, and *Krebsbach v. Henley*, *supra.* Accordingly, unless it can be

said that the Municipal Airport Act authorizes Tulsa to fix parking rates for the good of the public, Tulsa has, if Fine's allegations are proved, violated Oklahoma's antitrust law.

¶27 Prior to enactment of the Municipal Airports Act, municipalities with 2000 inhabitants had statutory authority to engage in the operation of an airport.[10] We viewed the operation of a municipal airport as a proprietary function.[11] In enacting

10. 1931 Oklahoma Compiled Statutes, § 6350.

11. *City of Blackwell v. Lee*, 1936 OK 767, 178 Okla. 338, 62 P.2d 1219. A 1958 amendment to Tulsa's municipal charter created the Airport Authority to operate the airport as a financially independent utility of the city. *City of Tulsa by and through Tulsa Airport Authority v. Air Tulsa, Inc.*, 1992 OK 146, ¶ 2 and ¶ 14, 851 P.2d 519, 520 and 522. This perception of a municipal airport as a proprietary function was changed in the 1947 Municipal Airports Act when the Legislature, in § 65.16, characterized the operation of a municipal airport as a governmental function, finding public purpose and public necessity.

Generally, all functions of a municipality are public in nature whether the municipality acts in a proprietary capacity or a governmental capacity. When a municipality acts in a proprietary capacity, it does so as a private corporation for its own purposes and benefits separate from the duties and powers imposed upon by the state, however, when a municipality acts in a governmental capacity, it does so as an arm of the state for the convenient administration of the government within territorial bounds of the municipality, for the public good on behalf of the state rather than for itself. *Public Service Co. of Oklahoma v. City of Tulsa*, 1935 OK 904, 174 Okla. 58, 50 P.2d 166, Syllabus, No. 2.

Fine does not challenge the Legislature's "public purpose and public necessity" perception of municipal air[illegible] Even though the

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the Municipal Airports Act, the Legislature authorized municipalities to plan, develop and operate public airports and declared these activities to be "public and governmental functions". 3 O.S.2001, § 65.16. It also granted municipalities various powers, including the power to "fix the charges, rentals or fees for the privileges or services" at a municipal airport, 3 O.S.2001, § 65.5(a)(3), and declared these powers to be exercised "for a public purpose, and matters of public necessity". 3 O.S.2001, § 65.16. A reading of these provisions leads us to but a single conclusion—When a municipality operates an airport pursuant to the Municipal Airports Act, it is acting in a governmental capacity as an arm of the state to meet a public need and not solely for its own benefit.

¶28 Because the Legislature intended to allow a municipality to operate parking facilities at a municipal airport as an arm of the state for the public good, a municipality may, like the state itself, fix the rate for the airport parking service even though it may have anti-competitive effects.[12] Accordingly, we determine that Tulsa's

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question might ultimately become a judicial one, what constitutes a public purpose and public necessity is a legislative matter. *In re Initiative Petition No. 319*, 1984 OK 23, ¶ 14, 682 P.2d 222, 224. Where there is no allegation or evidence challenging the legislative characterization of the public nature of a particular subject matter, the courts will not interfere with a legislative declaration of public purposes. *Democratic Party of Oklahoma v. Estep*, 1982 OK 106, ¶ 14, 652 P.2d 271, 276, footnote 19.

12. The Court of Civil Appeals also created a sweeping immunity from antitrust liability for a municipality if the challenged conduct is within the "police power." Police power is an inherent

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operation of an airport parking facility as authorized by the Municipal Airports Act, 3 O.S.2001, §§ 65.1, *et seq.* is not subject to the Oklahoma Antitrust Reform Act, 79 O.S.2001, §§ 201, *et seq.*

VIII. Conclusion

¶29 The Oklahoma Antitrust Reform Act, while expressly excluding the state from antitrust liability, clearly subjects municipalities to liability for anti-competitive conduct. Municipalities are not immune from the Act under the federal doctrine of state action immunity. The Municipal Airports Act authorizes municipalities to operate and regulate parking facilities and fix the rates for the parking services at municipal airports for the benefit of the public and as a public necessity. Because the Legislature intended to allow a municipality to operate parking facilities at a municipal airport as an arm of the state for the public good, a municipality may, like the state itself, fix the rate for airport parking service even though it may have anti-competitive effects. We hold that the district court did not err when it dismissed Fine's petition for want of any legal liability on

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attribute of sovereignty possessed by every state. *State ex rel. Roth v. Waterfield*, 1933 OK 546, 29 P.2d 24. The police power pertains to such rules and regulations relating to personal and property rights as affect the public health, safety and welfare. 16A C.J.S. Constitutional Law § 432. Tulsa is not exercising municipal "police power" when it fixes the price of airport parking because such regulation does not affect personal or property rights. The case relied on by the Court of Civil Appeals, *Ex Parte Houston*, 1950 OK CR 93, 224 P.2d 281, does not support the proposition that fixing the price of parking at a municipal airport is an exercise of police power.

the part of Tulsa under the state antitrust statutes, even though the district court based its dismissal on incorrect legal conclusions.[13]

CERTIORARI PREVIOUSLY GRANTED; OPINION OF THE COURT OF CIVIL APPEALS VACATED; DISMISSAL ORDER OF THE DISTRICT COURT AFFIRMED.

Watt, C.J., Opala, V.C.J., and Lavender, Hargrave, Summers, Boudreau, and Winchester, JJ., concur.

Hodges, J., concurs in result.

Kauger, J., recused.

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13. A trial court will be affirmed on appeal where it reaches the correct result although its decision is based upon erroneous legal conclusions. *Shelley v. Kiwash Electric Coop.*, 1996 OK 44, ¶ 16, 914 P.2d 669, 674.

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IN THE

Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

TELECOR COMMUNICATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. THE TENTH CIRCUIT'S STATE ACTION DECISION SHOULD BE VACATED AND REMANDED FOR RECONSIDERATION IN LIGHT OF AN INTERVENING DECISION OF THE OKLAHOMA SUPREME COURT

The court of appeals assumed without deciding that the state action doctrine applied to antitrust claims arising under Oklahoma law. (24a). The court then held that SWBT's pre-competition contracts were not protected by the doctrine because there was no clearly articulated state policy which "expressly permitted" them. (25a). This unduly restrictive standard is inconsistent both with the law of other circuits and this Court's precedents. While "expressly permitted" conduct is sufficient to invoke the state action doctrine, it is not necessary. So long as the anticompetitive effects of private actions supervised by state agencies operating within their statutory discretion are foreseeable, an antitrust defendant cannot be liable for those foreseeable results. (Pet. 12-17).

Although the decision below creates a conflict with other circuits which do not impose an "expressly-permitted" requirement, plaintiffs argue that an intervening decision of the Oklahoma Supreme Court, *Fine Airport Parking, Inc. v. City of Tulsa*, 2003 OK 27, __ P.3d __ (Okla. 2003) (Resp. App. 1a), renders the immunity issue moot. To the contrary, the intervening decision warrants vacatur and remand.

Fine involved a claim by a private parking facility owner that the City of Tulsa had excluded competition for airport parking by charging unreasonably low prices. Tulsa asserted that the state action doctrine immunized it from antitrust liability because state law authorized its allegedly anticompetitive conduct. The Oklahoma trial court and the Oklahoma Court of Civil Appeals both found that the state action doctrine was incorporated into Oklahoma law

(Resp. App. 3a), and that Tulsa thus was immune from antitrust liability.[1] The Oklahoma Supreme Court, however, while upholding the finding of immunity, rejected state action as a basis. For the first time, it held that because principles of federalism were not implicated when a city was a defendant in a *state* antitrust case, the *federal* state action doctrine should not apply. (Resp. App. 9a).[2]

Notwithstanding this aspect of its holding, the Oklahoma court's analysis in *Fine* went on to establish an immunity under Oklahoma law based on legislative intent that is significantly broader than the federal state action doctrine. Application of that analysis to the proceedings of the Oklahoma Corporation Commission ("OCC") that considered SWBT's pre-competition contracts at issue here shows that they are protected from antitrust attack. Although the statute in *Fine* authorized municipalities only to "establish the terms and conditions and fix the charges, rentals, or fees" for airport parking, the Oklahoma Supreme Court read into this language the possibility of "anti-competitive effects" flowing from the implementation of these commercial activities. (Resp. App. 13a-14a). It thus "follow[ed] logically" (Resp. App. 14a) that even the predatory pricing alleged in *Fine* was immune from antitrust attack.

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[1] These rulings were in harmony with the state legislature's instruction that Oklahoma antitrust law be construed consistent with federal antitrust law. *See* OKLA. STAT. tit. 79, § 212 (103a).

[2] In a prior opinion involving state action immunity as a defense to alleged violations of Oklahoma antitrust law, the Oklahoma Supreme Court rejected the defense on the merits, but did not question its applicability under state law. *See Bd. of Regents of the Univ. of Okla. v. NCAA*, 561 P.2d 499, 504-505 (Okla. 1977). It thus appeared that the state action doctrine applied under Oklahoma law.

It is particularly significant that the Oklahoma Supreme Court found that mere state authorization for a municipality to engage in commercial activity and set prices for its services was a sufficient basis to establish immunity for allegedly anticompetitive pricing. (Resp. App. 17a-19a). This holding stands in sharp contrast to the exacting requirements imposed in this case by the court of appeals, which denied immunity absent a clearly articulated state policy that "expressly permitted" the alleged restraints. It also contrasts with the approach taken in cases interpreting the "state action" doctrine generally, which refuse to infer the power to regulate anticompetitively from general authority to engage in ordinary business practices. *See, e.g., Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist.*, 171 F.3d 231, 235 (5th Cir.), *cert. denied*, 528 U.S. 964 (1999) (statutory grant of power to make contracts did not authorize entry into anticompetitive joint venture).

Under *Fine's* analysis a finding of immunity is warranted here. The OCC had plenary authority over public utilities like SWBT, including the authority to regulate SWBT's contracts. (*See* Pet. 13-16). It also had the authority to determine the timing and manner of the transition to competition in the provision of payphone service. (2a). After formal rulemaking proceedings to establish the regulations for that transition, the OCC declined the urgent requests of the state attorney general and competitors to abrogate SWBT's contracts. Instead of bringing their contract complaints back to the OCC, as the agency had specifically authorized, plaintiffs made them the centerpiece of their antitrust claims. As the dissent below recognized, these claims were "a collateral attack on the OCC's right to supervise, regulate and control matters relating to performance of [public utility] duties and of correcting abuses." (47a). The *Fine* decision shows that commercial contracts like SWBT's, no less than airport charges, are immune from antitrust liability where they are

subject to the authority and supervision of a state agency. Thus, even if this Court decides not to grant plenary review on the state action doctrine, it should vacate the Tenth's Circuit's decision and remand to take account of the Oklahoma Supreme Court's analysis in *Fine*.[3]

Vacating and remanding would allow the court of appeals properly to consider SWBT's immunity from state antitrust liability in light of *Fine* (using certification pursuant to Tenth Circuit Rule 27.1(A) and OKLA. STAT. tit. 20, § 1601 *et seq.* if appropriate). "'Where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate.'" *Lords Landing Village Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)); *see also Lehman Bros. v. Schein*, 416 U.S. 386 (1974) (vacating and remanding for the court of appeals to consider certifying an unsettled, controlling issue of state law to the state's highest court).

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[3] Plaintiffs advance three arguments that, they claim, would deny SWBT state antitrust immunity, notwithstanding *Fine*. (*See* Opp. 10-11). All are wrong. First, the state action question presented in the Petition has been superseded by a post-Petition decision of Oklahoma's court of last resort, so a remand to consider new controlling law is appropriate. Second, the Tenth Circuit's inability to consider the broad immunity subsequently recognized in *Fine* does not preclude remand, but rather counsels in favor of it. Third, plaintiffs mischaracterize briefs below to suggest SWBT disavowed an immunity argument in the district court. In reality, SWBT moved for a directed verdict regarding its pre-competition contracts, arguing on more general immunity principles, not state action, that liability under Oklahoma antitrust law could not be imposed given the OCC's review of those contracts. (TEL-SApp. 0137, 0154-55).

Because the *Fine* decision represents a change in Oklahoma law that occurred after the Petition was filed, the questions presented did not raise this issue. However, if, notwithstanding these circumstances, this Court believes that a formal amendment is needed to appropriately address the intervening decision in *Fine*, then SWBT respectfully requests leave to add the following question presented: "Whether the court of appeals erred in predicating its analysis of SWBT's immunity defense on federal law rather than on Oklahoma law." *See* Robert L. Stern *et al.*, SUPREME COURT PRACTICE § 6.27 (8th ed. 2002).

II. THE DECISION BELOW CONFLICTS WITH LAW IN OTHER CIRCUITS AND CONTROLLING STATE LAW BY AWARDING DAMAGES FOR AVOIDABLE FUTURE MISCONDUCT

Notwithstanding plaintiffs' speculation about possible bases for the jury's award (Opp. 16-18), the court of appeals found that it rested on the presumed future enforcement of SWBT's contracts. (32a). The law in other circuits and in Oklahoma, however, bars the imposition of damages for avoidable future conduct, including the future enforcement of existing contracts. (Pet. 21-22).[4]

Oklahoma has long precluded awarding damages for avoidable future misconduct. *See Comar Oil Co. v. Hackney*, 250 P. 93, 99 (Okla. 1926) ("if the injury . . . was abatable, then the plaintiff would only be entitled to damages that

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[4] Plaintiffs' characterization of this damages question as "fact-bound" is nonsense. (Opp. 14-15). The only "fact" underlying the Tenth Circuit's rejection of SWBT's position was its view that SWBT had not proven it would terminate the offending contracts after trial. (33a-34a). The reasoning and assumptions of the court of appeals on that score were deeply flawed. (Pet. 22-23). If they are facts at all, those determinations were clearly erroneous.

had accrued at the time the suit was brought"); *see also Fleming v. Perkins*, 212 P.2d 122, 129 (Okla. 1949) ("where the cause of injury is abatable . . . future damages may not be awarded"). The Tenth Circuit was obliged to consider Oklahoma law, *Thomas v. American Home Products, Inc.* 519 U.S. 913, 915 (1996) (Scalia, J., concurring) (states are the "final expositor" of state law); *Wood v. Eli Lilly & Co.*, 38 F.3d 510, 512 (10th Cir. 1994), but it failed to do so in its discussion of damages, even when raised by SWBT. This failure to follow state law is an additional basis to vacate the decision below and remand for further consideration, as discussed in Point I above.

Plaintiffs argue that these damages were proper because the jury was instructed to award damages only for "past" conduct. But that instruction is beside the point, since it failed to tell the jury that damages could not be awarded based on the presumption that SWBT would continue to enforce its contracts in the future. (SWBT-App. 3509). Indeed, the instruction reflected the district court's erroneous view that damages could be awarded for future enforcement of SWBT's contracts. (70a). And if any part of the general verdict included such damages, the entire verdict must fall. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 30 (1962); *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884); *see also Burke v. Thomas*, 313 P.2d 1082, 1089-90 (Okla. 1957) (remittitur or new trial).[5]

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[5] Plaintiffs' waiver arguments are sophistry. SWBT moved to strike plaintiffs' future damages theory during trial, and objected to plaintiffs' proposed jury instruction. (SWBT-App. 8329, 8353-55). SWBT filed a motion for a new trial raising the issue of future damages. (70a). Plaintiffs withdrew their request for injunctive relief only *after* SWBT filed a motion challenging plaintiffs' future damages claim. There is no rule of law that required SWBT to object again when its opponents dropped the remainder of their remedy claim.

By failing to consider state law on the issue of future damages, the lower court compounded its substantive errors. (*See* Pet. 20-23). Given this fatal omission, it is appropriate to vacate and remand this issue for reconsideration together with *Fine's* immunity analysis.

III. THE DECISION BELOW CONFLICTS WITH LAW IN OTHER CIRCUITS AND THIS COURT'S PRECEDENTS BY HOLDING AS A MATTER OF LAW ON SUMMARY JUDGMENT THAT THE RELEVANT MARKET NEED NOT ACCOUNT FOR INTERCHANGEABLE PRODUCTS WHICH PREVENT HARM TO CONSUMERS

Contrary to plaintiffs' assertions, SWBT has not "recast the market structure in a manner that is contrary to the undisputed summary judgment facts." (Opp. 23, 25). Putting aside differences over terminology – *e.g.*, whether locations owners are "distributors" or "customers" of payphone providers (Opp. 2, 3, 23 n.12), or provide "inputs" as plaintiffs told the court of appeals – the fundamental economic relationships between payphone providers, location owners and consumer end-users are not in dispute: payphone providers lease space from location owners in which to place their phones (often paying location owners "rent" based on commissions from call revenue) (3a), so that the providers can earn money when consumers place calls from those phones.

In applying the antitrust laws, the proper focus is on the "economic reality of the relevant transactions," not on arbitrary labels used to describe markets and market actors. *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 208 (1968); *see also Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 732 (1988); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595 (1986). Looking at the "economic reality" of the payphone business, the "area of effective competition" is where the parties

compete for "consumer potential" – namely, in the sale of payphone services to end-users. *Cf. Intergraph Corp. v. Intel Corp.* 195 F.3d 1346, 1353 (Fed. Cir. 1999).[6]

Because the antitrust laws are first and foremost intended to protect consumer welfare, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), the purpose of a market definition inquiry "is to determine whether an arrangement has the potential for genuine adverse effects on competition." *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 460 (1986). Here, plaintiffs cannot avoid the burden of proving harm to competition in the consumer market where they allegedly lost sales, because proof of such harm is an essential element of an antitrust damages claim. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The decision below holding otherwise conflicts with other circuits (Pet. 24-26), and this Court's antitrust decisions.

Plaintiffs beg the question of addressing "economic reality" by claiming that SWBT advocates an approach that would "require proof of injury to competition in a downstream ultimate consumer market if the *relevant* market is defined upstream." (Opp. 26) (emphasis in original). The question remains what market is "*relevant*." "Economic reality" demands that in a lawsuit between competitors in which damages are measured by lost revenue from end-users, the relevant market cannot be

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[6] Plaintiffs' argument that there are "sales" at the location owner level (Opp. 23 n.12) defies "economic reality." The core of plaintiffs' businesses, and their damages claims, are the revenues received for calls made by consumers on their payphones. The "economic reality" is that the commissions paid to location owners to rent space for payphones are costs, not "sales," and in any event, do not obviate the need for plaintiffs to show injury to competition at the level where plaintiffs and SWBT compete to make a living – at the level of the consumer end-user.

defined (as it was here) to bar a jury from assessing the impact (or lack thereof) of all reasonably interchangeable products (cellphones and payphones) on those end-users.[7]

Plaintiffs' continued reliance on monopsony cases (Opp. 22-23) is equally misguided. This is not a case brought by location owners claiming that SWBT's alleged monopsony was used to depress commissions.[8] Accordingly, "economic reality" demands more than blind application of cases involving such claims. It compels a nuanced evaluation of market realities that encompasses all evidence relevant to consumer harm.

Plaintiffs' Opposition also fails to justify the Tenth Circuit's flouting of basic principles governing summary judgment. While acknowledging there was insufficient

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[7] The suggestion that SWBT acquiesced in defining the relevant market by reference to location owners (Opp. 24 n.13, 26 n.15) is false. SWBT opposed plaintiffs' motion to define the market in that manner, sought interlocutory review of the court's ruling on market definition (which was denied, SWBT-App. 0018), and raised the issue on appeal. SWBT had no obligation to further object to a jury instruction defining the market in accordance with a summary judgment ruling it had already opposed. Nor did the court of appeals find waiver; it merely observed that the district court defined the market such that the jury could well have based its verdict on an assessment of the consumer/end-user market. (5a). If that was so, however, SWBT was entitled to make a comprehensive presentation of evidence about cellphones since, as the court of appeals explicitly found, there was no basis to exclude cellphone substitution from the market *if defined from the perspective of end-users*. (9a). Indeed, plaintiffs now argue their own evidence of adverse consumer impact (Opp. 26 n.16), but ignore the exclusion, *inter alia*, of SWBT's principal expert testimony about cellphones based on the erroneous market definition ruling. (66a).

[8] While the record shows, contrary to plaintiffs' claim (Opp. 2-3), that location owner commissions increased, the "economic reality" is that plaintiffs, as competitors, actually benefit from lower commissions (which reduce their costs), and hence could claim no damages in the location market. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990).

evidence to support the grant of summary judgment (8a-11a), the court of appeals affirmed because "there is no doubt that pay phones and cellphones are not interchangeable at the location owner level, and that is the level where the *Plaintiffs argued* that Southwestern Bell had monopolized competition." (11a) (emphasis added). Once again, plaintiffs fail to explain how "economic reality" permits market definition to be determined on the basis of plaintiffs' pleading rather than evidence and jury deliberation. The decision below usurps the jury's factfinding role, and is fatally inconsistent with *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992).

While this issue warrants plenary review (*see* Pet. 24-29), if the Court vacates and remands the first two questions presented by the Petition, the Court should also remand for reconsideration of the market definition issues in light of *Kodak* and *Brunswick*.

CONCLUSION

For the foregoing reasons, and those set forth in SWBT's Petition, the Petition for a Writ of Certiorari should be granted.

April 18, 2003

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No. 02-1171

IN THE

Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

TELECOR COMMUNICATIONS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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INTRODUCTION

In its Reply to the Brief in Opposition to Petition for a Writ of Certiorari, Petitioner Southwestern Bell Telephone Company (SWBT) requests leave to amend its Petition to raise a *new* question presented, and seeks *new* relief in the form of a summary order of remand to the Tenth Circuit for further consideration. *Reply*, 4-6, 10. Pursuant to Sup. Ct. R. 15(8), Respondents Telecor Communications, Inc., *et al.*, submit this supplemental brief to address these new matters.

I. There Is No Justification For The Proposed Amendment To The Question Presented

SWBT seeks to amend its Petition to revise its legal defenses in light of the Oklahoma Supreme Court's decision in *Fine Airport Parking, Inc. v. City of Tulsa*, 2003 OK 27, __ P.3d __ (Okla. 2003) by adding a new question presented: "Whether the court of appeals erred in predicating its analysis of SWBT's immunity defense on federal law rather than on Oklahoma law." *Reply*, 5.[1] To support the addition of a new question presented, SWBT invokes Robert L. Stern, *et al.*, Supreme Court Practice § 6.27 (8th ed. 2002). But as that authority makes clear, adding a question presented under these circumstances is both suspect and unwarranted. In particular, the proposed amendment comes after the 90-day jurisdictional period for filing certiorari petitions, which raises a serious question as to whether this Court even has jurisdiction to permit such an amendment. *Id.* at § 6.27, p. 427. Fortunately, this Court need not consider that issue, as any amendment of the questions presented is allowed only for "the most compelling of reasons," *id.*, and no compelling reasons exist here.

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1. This proposed new question makes no sense given that the District Court's rejection of SWBT's immunity defense, affirmed by the Tenth Circuit, *was* based on Oklahoma law. App. 82a.

As SWBT acknowledges, *Fine* affirmed the District Court and Tenth Circuit's rejection of its sole ground for immunity — the federal state action doctrine. Indeed, the District Court used the same rationale as *Fine*, concluding that the federalism principles underlying the doctrine were inapplicable under Oklahoma law. App. 82a; Resp. App. 9a. Having lost on that issue below, SWBT now argues that *Fine* warrants a remand of the case to the Tenth Circuit under the guise that *Fine* changed Oklahoma law and created a broader immunity. But *Fine* neither changed or reversed existing Oklahoma law, nor created a new immunity defense.

As the District Court noted below before *Fine* was decided, "no Oklahoma case recogniz[ed] application of the state action doctrine." App. 82a. In *Fine*, the Oklahoma Supreme Court made clear that the state action immunity doctrine does not apply under Oklahoma law, but found immunity under a well-established exemption analysis. Applying decades-old principles of statutory reconciliation, *Fine* held that the *specific* statutory authority to set parking rates for the public good[2] exempted the municipality from liability under the *general* antitrust statutes (which otherwise would have prohibited the conduct). *See Gardner v. School Dist. No. 87, Kay Co.*, 126 P. 1018 (Okla. 1912) (where *specific* statute permits a particular thing which would otherwise be prohibited under *general* statute, specific statute "is to be construed in the nature of an exception" to prohibition under general statute). Thus, having opted not to advance the exemption defense below,[3] SWBT should not

2. In *Fine*, plaintiff alleged that the municipality set parking rates at predatorily low levels. The *Fine* court found that the defendant municipality, acting as an arm of the state and for the public good, was expressly authorized by statute to set parking rates, the very conduct challenged as anticompetitive. *Fine*, Resp. App. 2a, 13a.

3. SWBT's contention that it raised "more general immunity principles, not state action" before the District Court (*Reply*, 4 n.3) (Cont'd)

be afforded an opportunity to do so now, particularly since, under the facts in this case, it would not change the outcome. *See* Part II, *infra*.

II. There Is No Justification For Summary Remand To The Tenth Circuit

In addition to seeking leave to present a new question, SWBT's Reply also makes a new request for a summary order granting certiorari, vacating the judgment below, and remanding the case for the Tenth Circuit to reconsider all issues raised in the Petition. A "GVR" is "potentially appropriate" only where "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation . . . ." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (*per curiam*). A GVR is not appropriate here because there is no intervening development that calls into question the Tenth Circuit's holdings in this case.

Not only does *Fine* not change Oklahoma law, but it also does not remotely suggest that the Tenth Circuit's decision was in error. In the decision below, the Tenth Circuit found nothing in Oklahoma law that "expressly permitted" SWBT's private anticompetitive conduct, and concluded that SWBT's private anticompetitive conduct was neither "regulated," "mandated," "authorized," "endors[ed]," "reviewed," nor even "known" by the Oklahoma Corporation Commission. *Telecor*, App. 25a n.7, 26a. Indeed, the Tenth Circuit

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(Cont'd)

is false. The "state action doctrine" is the only immunity defense SWBT listed in the Pretrial Order. SWBT-App 2168-70. SWBT disclaimed the exemption analysis before the Tenth Circuit. *See Respondents' Brief In Opposition*, at 11 n.4.

concluded that SWBT's conduct was designed "to stymie . . . competition" in order to monopolize the payphone market for its own private benefit and not because the regulatory program called for or anticipated any such result. *Id.* at 3a, 25a.

The Tenth Circuit's findings contrast sharply with the holding in *Fine* that the Municipal Airports Act expressly permitted the municipality's challenged anticompetitive conduct — the fixing of airport parking rates — as part of its "public and governmental functions" necessary in order "to meet a public need and not solely for its own benefit." *Fine*, Resp. App. 17a. In the instant case, SWBT took discretionary actions that were not called for by the regulatory program and were for its own benefit. Consequently, sending this case back to the Tenth Circuit would serve no purpose because the factual findings of the Tenth Circuit (which SWBT does not challenge) preclude *any* immunity.

SWBT's new request for a remand to the Tenth Circuit of the damage and market definition issues is also unsupported since SWBT fails to point to any "intervening development." On the damage issue, SWBT claims the Tenth Circuit failed "to consider" two Oklahoma Supreme Court decisions, both of which were decided over fifty (50) years ago and one of which was actually cited to and considered by the Tenth Circuit.[4] Because SWBT's requested GVR on damages is based on alleged failure to consider Oklahoma law, it also lies outside the scope of its question presented (which asserts the existence of a federal circuit conflict, *Pet.*, i). SWBT's only support for remand on the market definition issue is that the Tenth Circuit should be directed to reconsider two United States Supreme Court cases, both of which were

4. SWBT seeks reconsideration of the damage issue based on *Comar Oil Co. v. Hackney*, 250 P. 93, 99 (Okla. 1926), previously briefed by SWBT to the Tenth Circuit (*See SWBT's Pet. for Reh'g*, 13), and *Fleming v. Perkins*, 212 P.2d 122, 129 (Okla. 1949).

also cited to and considered by the Tenth Circuit.[5] Since these cases were cited to the Tenth Circuit, there is no reason to believe that reconsidering the same authorities would cause that court to change its opinion.

CONCLUSION

SWBT's request for leave to amend its question presented, and request for a GVR, are specious and should be denied.

Respectfully submitted,

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5. SWBT seeks reconsideration of the market definition issue based on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) and *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992), both of which were briefed by SWBT to the Tenth Circuit. (*See Brief of SWBT*, 27; *SWBT Pet. for Reh'g*, 2).